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No. 00-945

In The

Supreme Court of the United States

October Term, 2000

A. MICHAEL KAGAN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

PETITION FOR A WRIT OF CERTIORARI

GLENN A. GARBER
Attorney of Record
for Petitioner
350 Broadway - Suite 1207
New York, New York 10013
(212) 965-9370

David B. Krauss
Of Counsel

SW
St. Louis West, Inc. (9092)
NY (212) 684-3117 NJ (201) 863-8133
Printed on Recycled Paper

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Questions Presented

1. Whether in light of *Apprendi v. New Jersey* the due process clause under the Fifth Amendment and the notice and jury trial guarantees under the Sixth Amendment were violated when Mr. Kagan was sentenced under the mail fraud statute to a term in excess of the five year statutory maximum based on a penalty increasing offense element, "affecting a financial institution," that was not charged in the indictment, presented to the jury or found beyond a reasonable doubt.

2. Whether the due process clause under the Fifth Amendment and the right to testify under the Sixth Amendment were violated when the defendant informed the court that his severe lung and heart condition, which required multiple surgeries and the implantation of a cardiac defibrillator, prevented him from exercising his right to testify and the court failed to make a specific inquiry and finding to ensure the defendant did not involuntarily waive his right to testify.

3. Whether an erroneous jury charge on intent, that invites the jury to convict on materially less evidence than the statute demands, constitutes harmless error.

4. Whether the Federal Sentencing Commission's definition of a financial institution under Application Note 16 for U.S.S.G. § 2F1.1 is impermissibly vague when it includes the phrase "any similar entity, whether or not insured by the federal government."

A. Whether the Federal Sentencing Commission exceeded its statutory mandate under the Financial Institution Sentencing Reform, Recovery and Enforcement Act of 1989 (FIRREA) by including the "any similar entity" language in the definition of a financial institution under U.S.S.G. § 2F1.1.

B. Whether a premium finance company falls within the definition of a financial institution under U.S.S.G. § 2F1.1.

5. Whether the evidence was legally sufficient to sustain the mail fraud convictions; whether the proper standard to assess legal sufficiency was applied, and whether prejudicial spillover deprived Mr. Kagan of due process of law.

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No.
In the

SUPREME COURT OF THE UNITED STATES
A. MICHAEL KAGAN,

Mr. Kagan,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, A. Michael Kagan, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on July 18, 2000.

Opinions Below

The opinion of the Second Circuit, *United States v. Donald Ferrarini, Everett J. Vieira, A. Michael Kagan, Bruno Rumnigant, Howard Miller,* 219 F.3d 145 (2d Cir. 2000) appears as Appendix A. An unpublished summary opinion order was entered with the published opinion and it appears as Appendix B. An order was also entered on September 7, 2000, denying a petition for rehearing. It appears as Appendix C.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on July 18, 2000. An order denying a

timely petition for rehearing was entered on September 7, 2000. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under U.S.C. § 1254(1).

Constitutional Provisions, Statutes and Regulations Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

> nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The text of 18 U.S.C. § 371 appears as Appendix D.

The text of 18 U.S.C. § 1341 appears as Appendix E.

The text of Application Note 16 to U.S.S.G. § 2F1.1(b)(7)(A) appears as Appendix F.

STATEMENT OF THE CASE

Mr. Kagan was charged, along with officers and employees of UFG of conspiring to defraud CPF, a premium finance company.[1] His charges included conspiracy to commit mail fraud under 18 U.S.C. §§ 371, 1341 and 1342. Mr. Kagan's alleged offense was limited to an 8-month period. The UFG defendants were convicted of a wider 8-year conspiracy and various other charges.

According to the government, UFG forged client signatures on loan applications and fraudulently obtained loans from premium finance companies that were used to pay UFG's expenses. The government claimed that Mr. Kagan requested that CPF write the loans to UFG, and that UFG paid him

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[1] Mr. Kagan was also a shareholder and vice president of CPF. However, he had no loan approval authority whatsoever and was not involved in any day-to-day activities at CPF.

$425,000 for his assistance.[2]

Mr. Kagan challenged CPF's claim that it was defrauded. He contended that CPF was a young company vying for UFG's business, and was being creative in its attempts to increase its client base. To this end, CPF extended business loans ("bridge loans") to UFG to cover UFG's debts. He also argued that CPF denied the bridge loans at the criminal trial to advance a civil fraud suit that sought recoupment on the unpaid loans. Indeed, CPF's failure to follow due diligence and standard loan processing procedures indicated that CPF was writing bridge loans. In addition, there was evidence that CPF knew about UFG's personal loan practices, yet it still continued to do business with CPF, thereby further corroborating the bridge loan defense .

After trial, Mr. Kagan was convicted of one count of conspiracy and eight counts of mail fraud. He was sentenced to 70 months imprisonment, 3 years supervised release, and restitution in the amount of $ 4,962,000.00.

A.

The *Apprendi* Claim

The conspiracy statute that Mr. Kagan was sentenced under provides for a maximum sentence of five years in jail. 18 U.S.C. § 371 appears as Appendix D. The mail fraud statute that he was sentenced under provides for a maximum sentence of five years, unless the fraud "affect[ed] a financial

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[2] Mr. Kagan was also charged with five mail fraud counts involving his insurance agency, KBC, and CPF.

institution," in which case the sentence shall not exceed 30 years. 18 U.S.C. § 1341 appears as Appendix E.

Mr. Kagan was never indicted for a mail fraud that *affected a financial institution*, nor was this element ever submitted to the jury or proven beyond a reasonable doubt. Nevertheless, he was sentenced to 70 months in prison, a term beyond the five year maximum on the conspiracy and the mail frauds.

Apprendi v. New Jersey, 530 U.S.___, 120 S.Ct. 2348 (2000) was decided on June 26, 2000, after the appellate briefs were filed and shortly before the Second Circuit rendered its decision on July 18, 2000. A petition for rehearing was made which raised an *Apprendi* claim. The Second Circuit denied rehearing in a one sentence order and never addressed the *Apprendi* issue. The Order appears as Appendix C.

B.

The Right to Testify Claim

Mr. Kagan never testified at trial, and he claims that his medical condition caused him to involuntarily waive his right to testify.

Shortly before trial, Mr. Kagan was hospitalized for 21 days for a catastrophic heart and lung condition that required quadruple bypass surgery and the implantation of a cardiac defibrillator.[3] His recovery was delayed by post-operative

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[3] Mr. Kagan had severe congestive heart failure, coronary artery disease, ventricular tachycardia, ischemic

complications. The Court denied a severance motion and granted a four month continuance. Mr. Kagan continued to suffer from severe medical problems. Less than six weeks before trial, counsel protested:

> [I]t's quite likely in the normal course of events Mr. Kagan would testify on his own behalf. There is no way I can envision his being in a position to be able to testify in his own behalf given his current medical condition.

Then, less than one month before trial, counsel submitted an affirmation stating:

> [P]rior to his surgery... it was my opinion that it was likely that he would testify on his own behalf. That given his current condition it appears likely that I will be unable to call him to testify.[4]

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cardiomyopathy, emphysema, low oxygen saturation, pulmonary edema, shortness of breath, and vertigo.

[4] Prior to his illness Mr. Kagan testified at a deposition in a bankruptcy proceeding involving UFG and CPF. Under oath, he denied arranging loans for UFG, and stated that he was wholly unaware of UFG's financial distress, which, according to the government, was the reason that UFG and Mr. Kagan defrauded CPF. Indeed, he relied on the same SEC 10Ks and 10Qs that UFG publicized and that CPF also relied upon. It was also made clear in pre-trial submissions that his testimony would be required to distance himself from the UFG defendants at trial, to explain that the

Mr. Kagan also submitted an affirmation from his cardiovascular surgeon that he was "not currently able to withstand the stress and pressures of the preparation for or participation in a criminal trial." An examining cardiologist stated that "it would be dangerous, and potentially life threatening to subject Mr. Kagan to a trial...," and that he was not "expected to withstand the rigors of trial safely" until he was "medically stabilized" and underwent "cardiac rehabilitation."

At a physical competency hearing, testimony was only taken from a physician hired by the government.[5] He concluded that Mr. Kagan was physically capable of going to trial.[6] He also found "usual courtroom proceedings to be likely to produce an emotional crisis or collapse." Notably, the government never addressed Mr. Kagan's ability to testify or to withstand the rigors of cross examination.

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purported "kickbacks" were payments for the sale of KBC to UFG, and to establish that he was caring for his hospitalized fatally ill mother during periods that were critical to his alleged involvement in the fraud.

[5] The district court refused to hear from a defense expert because he was delayed and could not appear until the early afternoon on the day the court scheduled his testimony. It should be noted that the court reconvened that same afternoon on other matters, yet it still precluded the defense expert's testimony.

[6] The government's doctor merely reviewed some of the reports prepared by Mr. Kagan's treating physicians before giving his opinion.

The district court denied a severance or a trial adjournment based solely upon the government doctor's general opinion that Mr. Kagan could stand trial. Importantly, the court ignored Mr. Kagan's counsel's protests about an involuntary waiver of the right to testify and limited its concern to Mr. Kagan's ability to passively sit through trial.[7] The district court's ruling appears as Appendix G.

It is noteworthy that evidence totally demonstrated that Mr. Kagan's health impeded his ability to testify. During trial there were numerous instances where Mr. Kagan had trouble catching his breath.[8] Mid-trial, he was prescribed new medication to increase blood flow and to ease severe chest pains and shortness of breath, and his hypertension medication was increased. In addition, upon a check of Mr. Kagan's cardiac defibrillator after trial, it revealed at least 17 life-threatening episodes of ventricular tachycardia, with a likelihood that many occurred at the trial.

The Second Circuit determined that the district court had an obligation to find that Mr. Kagan was capable of testifying before it denied a severance or an adjournment. Opinion appears as Appendix A. However, it concluded that the district court's general finding that Mr. Kagan could stand

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[7] The court also rejected the government doctor's finding about a "likely" "emotional crisis or collapse" as a lay opinion.

[8] At trial prior to the defense case, he submitted a letter from his pulmonary specialist diagnosing his breathing problems as low oxygen saturation related to emphysema.

trial sufficed, even though the district court never focused on his ability to testify or to sustain cross examination. It also cited to the district court's decision rejecting bail pending appeal which was rendered over 5 months after the fact and after it was apparent that Mr. Kagan would be advancing a right to testify claim on appeal, to find that Mr. Kagan could testify. The district court's order appears as Appendix H.

C.

Erroneous Conscious Avoidance Charge

The Court submitted a conscious avoidance charge. The government referred specifically to the charge during summation and argued that conscious avoidance undermined the bridge loan defense. Mr. Kagan argued that the government's case was one of actual knowledge and that the bridge loan defense merely attacked the reliability of CPF's fraud claim, which never provoked an argument that Mr. Kagan consciously avoided knowing anything. The Second Circuit agreed and held that there was no factual predicate to warrant a conscious avoidance charge. However, the Court found that the error was harmless since evidence supported an actual knowledge theory.

D.

Financial Institution

The district court found that CPF, a premium finance company, met the definition of a financial institution under Application Note 16 of U.S.S.G. § 2.F1.1(b)(7)(A), and it enhanced Mr. Kagan's sentence by four levels. The Second Circuit affirmed.

E.

Insufficiency of Evidence

There was no evidence at trial that the notices of acceptance for the five KBC mail fraud counts were ever mailed. Rather, routine mailing practices for other notices were relied upon by the circuit to sustain the proof on these counts.

Mr. Kagan claims that the Circuit failed to properly apply the sufficiency standard as articulated in *Jackson v. Virginia, 443 U.S. 307* (1979), and that the prejudicial spillover from the insufficient counts violated his rights to due process and a fair trial on the remaining charges.

REASONS FOR GRANTING THE WRIT

Point One

This Court should vacate the judgment and remand the case for further consideration in light of *Apprendi v. New Jersey* to place Mr. Kagan on line with similarly situated criminal defendants who have pressed meritorious *Apprendi* claims in this Court on direct review.

In the landmark case, *Apprendi v. New Jersey*, 530 U.S. ___, 120 S.Ct. 2348 (2000), this Court held that "[o]ther than the fact of prior conviction, any fact that increases the penalty beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt." Mr. Kagan was charged and tried for mail fraud under 18 U.S.C. § 1341, which provides for a maximum five year sentence unless the

"violation affects a financial institution," in which case the penalty is increased to a maximum of 30 years. The indictment did not charge the financial institution element, nor was it presented to the jury or found beyond a reasonable doubt. Mr. Kagan was also charged with conspiracy under 18 U.S.C. § 371. Both charges carry a 5 year maximum sentence. Nevertheless, the district court sentenced Mr. Kagan beyond the five year statutory maximum. Consistent with this Court's practices on *Apprendi* claims raised during direct review, and its jurisprudence on retroactivity, it should vacate the judgment and remand the case to the Second Circuit for further proceedings in light of the principles announced in *Apprendi* .

The sentence imposed in this case under the mail fraud statute, implicates the rule in *Apprendi* mandating reversal. 18 U.S.C. § 1341 provides in relevant part:

> Whoever, [uses the mails to defraud] shall be...imprisoned not more than five years... If the violation affects a financial institution, such person shall be ...imprisoned not more than 30 years.

It is now clear that 18 U.S.C. § 1341 creates two separate offenses -- a basic mail fraud carrying a maximum five year sentence and an aggravated mail fraud founded on the element of "affect[ing] a financial institution" carrying a maximum 30 year term. *See United States v. Ubakanma*, Dkt. No. 97-4913 (4th Cir. 6/12/00)(finding violation under similar wire fraud statute). Mr. Kagan was sentenced to 70 months, a sentence that exceeds the maximum penalty for the basic mail fraud. However, the indictment made no reference to the aggravating financial institution element, nor was it found by a jury beyond a reasonable doubt.

It is self-evident that an *Apprendi* violation occurred. The judgment should therefore be vacated.

A.

***Apprendi v. New Jersey* announced a new rule of constitutional law that is retroactive to claims presented on direct review under *Griffen v. Kentucky* and the plain error rule.**

It is this Court's practice to issue writs of certiorari in direct appeal cases where *Apprendi* violations were not raised below. This Court has made no distinction between litigants who advanced *Apprendi*-type claims for the first time on direct appeal, *Blue v. United States*, Dkt. No. 99-6775 (cert. granted 10/2/00), or on a petition for a writ of certiorari. *Humphrey v. United States*, Dkt. No. 00-5644 (cert. granted 11/13/00). This practice comports with the teachings of *Griffen v. Kentucky*, 479 U.S. 314 (1987) and the plain error doctrine. Fed.R.Crim.P. 52(b); *United States v. Olano*, 507 U.S. 725 (1993), and in the interest of uniformity it should be employed in the instant case.

In *Griffen* this Court held that a new constitutional rule applies retroactively to all cases pending on direct review, or not yet final when the rule is announced. *See Griffen*, at 712, n. 6 (defining final to include cases pending before the Supreme Court on a petition for a writ of certiorari). There can be no dispute that Mr. Kagan's case was not yet final when *Apprendi* was decided.

Equally clear is the that fact that *Apprendi* announced a new rule of constitutional law that was unavailable to criminal defendants. *Apprendi* is founded on principles of Due Process

and the Jury Trial and Indictment Notice Guarantees. *See also McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)(recognizing constitutional significance of claim). However, until *Apprendi*, it was the routine practice of treating statutory penalty increasing factors as mere sentencing factors.[9] Undoubtedly, *Apprendi* announced a new rule of constitutional law and in light of *Griffin* it applies retroactively here.

The *Apprendi* claim is also reviewable under the plain error doctrine. In *United States v. Olano*, 507 U.S. 725 (1993), this Court set a four part test to satisfy the plain error rule. Fed.R.Crim.P. 52(b). There must be 1) an error of law; that is, a " [d]eviation from a legal rule," *Id.* at 732-33; 2) it must be "plain," meaning "clear" or "obvious." *Id.* at 732-33; 3) the error must "affec[t] substantial rights," which normally requires prejudice, *Olano*, at 734; and 4), since the rule is permissive, appellate courts have discretion to apply the rule. *Id.* at 735. However, this Court instructed appellate courts to notice the error where it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736, quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936). It also made it clear that sentencing errors are fully covered by the plain error doctrine. *Id.* at 736-37 (satisfaction of discretion prong not reserved for errors bearing on the defendant's innocence).

In this case, the plain error test is met. As discussed,

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[9] *See, Jones v. United States*, 526 U.S. 227 (1999), and *Castillo v. United States*, 120 S.Ct. 2090 (2000) (foreshadowing *Apprendi*, but grounded on the language, structure and legislative history of the statutes).

Apprendi v. New Jersey exposed a deviation from acceptable sentencing practices and in the instant case that is "clear" and "obvious." Mr. Kagan was also prejudiced. He was never placed on notice via indictment of the aggravating mail fraud offense (affecting a financial institution). Moreover, the financial institution element was never submitted to the jury or found beyond a reasonable doubt. Nevertheless, he received a sentence beyond the five year maximum, a punishment that would have only been permissible had the financial institution element been established at trial beyond a reasonable doubt.

And, finally, in light of the gravity of the violation, the fourth part of the test is easily satisfied. As stated in *Apprendi*, "[a]t stake are constitutional protections of surpassing importance." *Apprendi*, at 120 S.Ct. at 2355-56. It goes without saying that the error here "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, at 736.

Moreover, as stated in Justice Thomas's concurrence in *Apprendi*, any fact that increases a sentence is an offense element and should be subjected to the notice by indictment and proof beyond a reasonable doubt requirements. Therefore, Mr. Kagan contends that the additional guideline enhancements for the amount of the fraud, for more than minimal planning, for abuse of position of trust, and for defrauding of a financial institution also run afoul of *Apprendi*. Mr. Kagan also claims that the restitution order violated *Apprendi* because it constitutes a punishment in the absence of notice by indictment and proof beyond a reasonable doubt on the restitution amount.

In sum, Mr. Kagan's claim falls squarely within the parameters of *Griffen* and Rule 52(b). The *Apprendi* claim should therefore be reviewed by this Court and a writ of

certiorari should issue. Consistent with this Court's practices, it should remand the matter to the Second Circuit for further proceedings in light of *Apprendi v. New Jersey*.

Point Two

Review will enable this Court to resolve a conflict in the circuits and decide an important unsettled question of federal law, namely, whether a judicial inquiry focusing specifically on the right to testify is required to protect against an involuntary waiver of the right.

Mr. Kagan calls upon this Court to address an important and unsettled federal question that has caused conflict in the circuit courts regarding the protections a criminal defendant must be afforded to ensure that the fundamental right to testify under the Fifth and Sixth Amendments is not involuntarily waived.

In the instant case, Mr. Kagan expressed an interest in testifying but asserted the physical incapacity to do so. The district court conducted an inquiry and found that he was capable of participating in his trial. However, it never considered the specific right to testify or Mr. Kagan's ability to sustain the rigors of cross examination. Although the circuit court held that the district court had an affirmative obligation to determine that Mr. Kagan could in fact testify before it ordered him to trial, it determined that the district court's general finding about trial participation met this obligation. Mr. Kagan contends that a thorough and searching inquiry focused specifically on his capacity to testify was required, and that without such inquiry both courts failed to protect Mr. Kagan against an involuntarily

waiver of the right to testify.

Thirteen years ago in *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987), this Court made it clear that "fundamental to a personal defense" every criminal defendant has the right to testify in his own behalf. As recognized in *Rock*, the right stems from the Jury Trial Guarantee in the Sixth Amendment and is a "necessary corollary to the Fifth Amendment's guarantee against compelled testimony. *Id.* at 52. The Court emphasized that "the most important witness for the defense in many criminal cases is the defendant himself," and that a "defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." *Id.* at 2709. *See also Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975)(right to testify as "essential to due process of law in a fair adversary process" and aligning it with self representation and the right to conviction only when guilt is proven beyond a reasonable doubt).

In the wake of *Rock*, every circuit that has passed on the issue has held that the right to testify is a "personal" right that can only be waived by the defendant.[10] This proposition

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[10] *See Brown v. Artuz*, 124 F.3d 73, 77-78 (2d Cir. 1997); *United States v. Ortiz*, 82 F.3d 1066, 1077 (D.C. Cir. 1996); *United States v. Pennycooke*, 65 F.3d 9, 10-13 (3d Cir. 1995); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *Jordan v. Hargett*, 34 F.3d 310 (5th Cir. 1994); *United States v.* Webber, 208 F.3d 545, 550 (6th Cir. 2000); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990); *United States v. Bernloeher, 883 F.2d 749, 751 (8th Cir. 1987); United States v. Joelson*, 7 F.3d 174 (9th Cir. 1993); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir.

necessarily equates the right to testify with other personal rights, such as the right to trial and to assistance of counsel, which can only be waived after a court personally addresses the defendant and finds that the waiver of the specific rights are knowing, intelligent and voluntary. *See Boykin v. Alabama*, 395 U.S. 238 (1969) (waiver of trial by guilty plea) and Fed.R.Crim.P 11 (codifying *Boykin); see also Carnley v. Cochran*, 369 U.S. 506, 513-14 (1962)(holding that a waiver of the right to counsel must be knowing and intelligent and cannot be presumed on a silent record). As a result, it has spurred a conflict in the circuits over the role of the courts when they are confronted with waivers of the right to testify. Some circuits hold that the trial courts have no obligation to ensure that a waiver of the right to testify is knowing, intelligent and voluntary.[11] Whereas other circuits have embraced the notion that a court may have to personally address the defendant to protect the right to testify; for example, where it is claimed that the right is being denied (*Jordan v.*

1992); *see also Lema v. United States*, 987 F.2d 47, 52 (1st Cir. 1993)(dicta).

[11] *United States v. Pennycooke*, 65 F.3d 9, 11 (3d Cir. 1995); *United States v. Brimberry*, 961 F.2d 1286, 1289-90 (7th Cir. 1992); *United States v. Teague*, 953 F.2d 1525, 1533, n. .8 (11th Cir. 1992); *United States v. Campione*, 942 F.2d 429, 439 (7th Cir. 1991); *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *United States v. Edwards*, 897 F.2d 445, 447 (9th Cir. 1990); *United States v. Martinez*, 883 F.2d 750, 757 (9th Cir. 1989); *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987); *United States v. Bernloehr*, 833 F.2d 749, 752 (8th Cir. 1987); *United States v. Janoe*, 720 F.2d 1156, 1161 (10th Cir. 1983).

Hargett, 34 F.3d 310, 314-15 & n.4 (5th Cir. 1994), where a defendant voices an interest in testifying, or where counsel is frustrating the right. *United States v. Pennycooke*, 65 F.3d 9, 12-13 (3d Cir. 1995); *see also Brown v. Artuz*, 124 F.3d 73, 77-78 (2d Cir. 1997)(citing approvingly to *Pennycooke*); *United States v. Vargas*, 920 F.2d 167, 170 (2d Cir. 1990)(disapproving waiver on silent record).

Mr. Kagan's contention presumes an affirmative obligation on the courts to protect the right to testify, and it therefore serves as a vehicle to resolve the circuit conflict. He presses this Court to adopt the "affirmative obligation" doctrine recognized in the circuits, as well as the Second Circuit in this case. He also asks this Court to require that the affirmative obligation be applied so that the right to testify is recognized independently and protected apart from other rights. Mandating such an application is necessary to place the right to testify on parity with other *personal* constitutional rights and to ensure that it is not improperly waived. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(waiver of personal constitutional right to counsel must be predicated on "an intentional relinquishment" of this specific right); *see also Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969)(courts must focus on the specific rights one is forfeiting when waiving the personal constitutional right to trial).

Here, Mr. Kagan alerted the district court to a potential involuntary waiver of the right to testify. He requested a short continuance for trial or severance from his co-defendants because he was recovering from severe lung problems and a heart attack, which required quadruple bypass surgery and the implantation of a cardiac defibrillator. The district court denied Mr. Kagan's requests and ordered him to proceed with trial.

The manner in which the district court disposed of his

adjournment or severance motion and the way the court of appeals decided Mr. Kagan's right to testify claim impermissibly diluted the significance of the personal right to testify. Despite trial counsel's protests, the district court ignored the right to testify, and instead, limited its concern to Mr. Kagan's ability to passively sit through trial and witness his defense. On appeal, the Second Circuit agreed that the "district court was required to assess his physical ability to be a witness in his own defense." However, instead of requiring a meaningful evaluation of the involuntary waiver claim, the court of appeals relied on the district court's post hoc statement made in response to a motion for bail pending appeal, more than five months after the trial, to determine that Mr. Kagan's right to testify was not abridged. Moreover, despite the district court's complete absence of attention to Mr. Kagan's right to testify when it considered his motion for severance or adjournment, the court of appeals held that general evidence adduced about Mr. Kagan's ability to stand trial was sufficient to support the post hoc conclusion.

The district court judge was not a medical expert, and it is hard to fathom how she could ascertain, through a superficial viewing, that Mr. Kagan could withstand the stress of testifying, and, more importantly, hold up during the rigors of cross examination. Undoubtedly, a more focused inquiry particular to the right to testify was necessary to protect against an involuntary waiver of such a significant constitutional right. Waivers of rights of equal importance, like the right to trial (*Boykin v. Alabama*, 395 U.S. 238 (1969); Fed.R.Crim.P. 11) and to counsel (*Carnley v. Cochran*, 369 U.S. 506 (1962)), mandate such a protection. There is no sound reason to relegate the right to testify to a position inferior to these other rights, especially in a case like this one where the defendant alerted the court to a problem with his testimony.

In sum, in light of the failure to protect Mr. Kagan against an involuntary waiver of the right to testify, this Court should reverse the court of appeal's decision. Such a holding will not only settle an important question of federal law, but it will resolve a conflict in the circuits.

Point Three

Review will enable this Court to decide an important, unsettled question of federal law, namely, whether an erroneous jury charge on intent, that invites the jury to convict on materially less evidence than the statute demands, is harmless error.

The Second Circuit found that it was error to submit a conscious avoidance charge to the jury on the conspiracy and mail fraud charges because there was no factual predicate for the instruction. However, it held the error to be harmless in light of evidence supporting Mr. Kagan's actual knowledge. Mr. Kagan contends that the erroneous jury charge usurped the jury's finding on the critical issue of intent in violation of the right to a jury trial and due process of law, and that the error cannot be harmless.

There can be no doubt that an unwarranted conscious avoidance charge offends the constitution. As held in *Francis v. Franklin*, 471 U.S. 307, 314-315 (1985), a permissive presumption instruction violates due process "if the suggested conclusion [from the jury charge] is not one that reason and common sense justify in light of the proven facts before the jury." *See also Ulster County Court v. Allen*, 442 U.S. 140, 157-163 (1979). As such, in a case like this where there was no factual basis for a conscious avoidance finding, the charge

impermissibly permits the jury to presume intent in violation of due process of law. Indeed, an erroneous conscious avoidance charge permits the jury to substitute proof of actual knowledge with proof of a distinctly different and much lesser mental state, namely, that one may have known. See *United States v. Mancuso*, 42 F.3d 836, 845 (4th Cir. 1994). Moreover, in the absence of sufficient facts establishing deliberate avoidance of knowledge, the charge can "create a presumption of guilt," *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1324 (9th Cir. 1977), effectively shifting the burden to the defense to affirmatively disprove knowledge. *See Sandstrom v. Montana*, 442 U.S. 510, 512 (1979)(jury instruction that creates a mandatory presumption on intent is unconstitutional).

Before a constitutional error can be held harmless, the court must find that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). A review of cases in this Court indicates that, contrary to the Second Circuit's finding, the error in this case cannot be deemed harmless. In *Connecticut v. Johnson*, 460 U.S. 73, 86-87 (1983), this Court stated:

> To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.
>
> ....
>
> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon the evidence. If

> the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.

Similarly, in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), this Court held that: "The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *See also Id. at* 280 (Sixth Amendment requires more than appellate speculation about a hypothetical jury's action); *Carpenters & Joiners v. United States*, 330 U.S. 395, 408-09 (1947)("failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction."); *Bollenbach v. United States*, 326 U.S. 607, 615 (1946)(Frankfurter, J) ("In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.").

And finally, in *United States v. Sun Diamond Growers of California*, 526 U.S. 398 (1999), the district court gave an erroneous jury instruction which incorrectly explained an offense element under a federal gratuity statute. This Court held that the error, in effect, invited the jury to convict on materially less evidence than the statute demanded, and that it therefore, could not be deemed a harmless error. Mr. Kagan's case is conceptually on point with the *Sun Diamond* case. In submitting an erroneous jury instruction on conscious avoidance, the district

court lowered the threshold on intent, a significant and contested issue in the case, and it allowed the jury to convict on materially less evidence than actual knowledge as required by the statutes under which he was convicted.

The Second Circuit's incorrect assumption that there was enough evidence to base the conviction on actual knowledge failed to take into account that the jury could have easily based its guilty verdict on the lower threshold theory of conscious avoidance and that there was no way that the Court could hold that this error did not contribute to the verdict in this case. There is no reason to believe, that the jury would have deliberately undertaken the more difficult task of evaluating the theory of actual knowledge. See *Connecticut v. Johnson*, supra. at 85.

Moreover, it is obvious that the government asked for the conscious avoidance charge because there was not overwhelming evidence of actual knowledge. The government also urged the jury in summation to rely on the flawed theory of conscious avoidance. The erroneous charge, coupled with the summation, highlighted the error and compounded the prejudice.

In sum, the conscious avoidance instructions invited the jury to convict on a theory that required materially less evidence to convict than the charges demanded, and there was a reasonable likelihood that the jury applied the erroneous conscious avoidance instruction to reach its verdict. As a result, the Second Circuit violated Mr. Kagan's rights to due process of law and to a trial by jury by deeming the error harmless. Mr. Kagan's conviction must therefore be reversed.

Point Four

Review will enable this Court to decide an important unsettled question of federal law concerning the definition of a "financial institution" under Application Note 16 to U.S.S.G. § 2F1.1.

The Second Circuit affirmed the district court's finding that a premium finance company constituted a "financial institution" as that term is defined in U.S.S.G. § 2F1.1. This finding enhanced Mr. Kagan's sentence by four levels under the Guidelines (2 years). The controversy here surrounds the "any similar entity" clause which expands the definition under Application Note 16.

In *Stinson v. United States*, 508 U.S. 36, 44-45 (1993), this Court held the commentary to the Sentencing Guidelines is binding on the courts unless it violates the Constitution, is inconsistent with a federal statute, or there is a plainly erroneous reading of the Guideline. Mr. Kagan's contends that the "any similar entity" language is unconstitutionally vague, and that the Commission exceeded its statutory mandate under FIRREA when it adopted the phrase. He also argues that a premium finance company is not a financial institution.

A.

The Sentencing Guidelines and the Commentaries are akin to Criminal Statutes and the "any similar entity" clause cannot sustain a vagueness challenge.

This Court has held that "the Guidelines bind judges and

courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Mistretta v. United States*, 488 U.S. 361, 391 (1989), and that commentary accompanying the Guidelines should be treated as an agency's interpretation of its own legislative rules. *See Stinson v. United States, supra.* In the wake of this jurisprudence, courts hold that the Guidelines have the force and effect of law, and they are to be interpreted like criminal statutes. *United States v. Kirvan*, 86 F.3d 309, 311 (2d Cir. 1996); *United States v. Lewis*, 93 F.3d 1075, 1080 (2d Cir. 1996).

A criminal statute can be impermissibly vague if it 1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits and 2) if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago v. Morales*, 527 U.S. 41 (1999). In *McBoyle v. United States*, 283 U.S. 25 (1931), Justice Holmes warned against the vague and expansive construction of criminal statutes. Similarly, in *Kolendar v. Lawson*, 461 U.S. 352 (1983), this Court held that vague statutes tend to give rise to selective and arbitrary prosecution and this often lessens the degree to which an actor is on notice that his or her conduct is illegal.

Application Note 16 to U.S.S.G. § 2F1.1 defines the term financial institution and lists a variety of entities that fall under the definition. *See* Appendix F. The definition does not specifically include a premium finance company, but at the end of the list is a "catch all" phrase that expands the definition to include "any similar entity, whether or not insured by the federal government."

This term is a vague and ambiguous term that allows courts to include entities that do not qualify as financial institutions for the sole purpose of enhancing punishment. The

potential for abuse is boundless. All a court has to do is apply a subjective test and determine that the entity in their opinion is similar. The degrees of similarity are not specified and there are no tests to determine what "similar" actually means. *United States v. Uffman*, No. 94-00139-01-CR-W-6, 1994 WL 504601 (W.D. Mo. Sept. 9, 1994)(finding premium finance company not to be a financial institution). In fact, the district court and the circuit in this case differed in their opinions on the issue. The district court found a premium finance company was similar to an insurance company, while the Circuit found that it was similar to a bank. *See also CPF Premium Funding v. Ferrarini, et. al.*, 1997 WL 158361 (S.D.N.Y.)(holding that CPF was not a financial institution under bank fraud statute).

This Court should not tolerate such disparate views and it should strike down the "any similar entity" clause as impermissibly vague.

B.

The Sentencing Commission Exceeded its Statutory Mandate under the Financial Institution Sentencing Reform, Recovery and Enforcement Act of 1989 (FIRREA).

This Court has held that although Congress has delegated significant discretion to the Sentencing Commission, that discretion must "bow to the specific directives of Congress". *United States v. Labonte*, 520 U.S. 751, 757 (1997). This Court has also held that when sentencing guideline commentaries violate a federal statute or when the guideline is inconsistent or runs afoul of the statute, it is no longer authoritative. *Stinson v. United States*, *supra*. at 45; *United States v. Labonte*, supra. at 757.

The expanded definition of financial institution which includes the "catch all" phrase "any similar entity" is at odds with FIRREA. Not only does it go further than FIRREA, but it broadens it to the point where the entities that can be included under the definition of financial institution are at odds and inconsistent with the statute.

FIRREA was enacted to prevent and deter a repeat of the savings and loan scandal that forced the federal government to bail out failed banks and other federally insured entities. FIRREA was designed to protect federally insured financial institutions that affect a large segment of the population. See, House Report No. 101-54, pages 311, 399-401; House Conference Report No. 101-222, pages 445-446, 1989 U.S.C.C.A.N. 107, pages 195-197, 484-485.

Undoubtedly, Congress limited the statute to financial institutions that were insured by the federal government. There was no support for this broad expansion in the enabling legislation. Congress expressed no intent on punishing entities that were not federally insured. When Congress specifically listed certain items in the statute it is implicit that it meant to exclude all other items not listed. It simply makes no sense to include small, privately held premium finance companies that are not federally insured, that do not hold public funds in trust, invest public funds, or even affect the public at large, and that were not included or envisioned in the type of ills the statute was designed to protect.

Despite the unambiguous and specific directive from Congress, the Sentencing Commission expanded the definition of financial institution to include many entities, some that were not even insured by the federal government. The practical effect

of this expansion is that it created enhanced punishment for entities that were wholly inconsistent with the Congressional directive. The "any similar entity" clause cannot be reconciled with FIRREA and should be vitiated by this Court as an unlawful expansion that is inconsistent with statutory law.

C.

A Premium Finance Company is Not a Financial Institution and the Rule of Lenity should apply under these circumstances.

The United States Supreme Court has repeatedly held that when assessing the reach of a federal criminal statute, courts should adopt a strict and narrow interpretation. *Dowling v. United States*, 473 U.S. 207, 213-214 (1985); *Williams v. United States*, 458 U.S. 279, 290 (1982). Just as federal criminal statutes are to be strictly construed, the sentencing guidelines must also be strictly construed. *United States v. Khang*, 904 F.2d 1219, 1222 (8th Cir. 1990).

The lower courts painted with a dangerously broad brush when it included a premium finance company, such as CPF, in the financial institution definition. This guideline enhancement clearly offends principles of strict construction and fair warning. CPF was a non- federally insured, small, privately held company that did not invest funds taken from the public, hold public funds in trust, and was not a depository institution. Under a narrow and strict reading of the definition under the commentary, there is no way that this type of entity should have been included in the definition. It is like trying to fit a square peg in a round hole.

Under the rule of lenity, ambiguities concerning legislative intent in criminal statutes are to be resolved in favor of the accused. *Ratzlaf v. United States*, 510 U.S. 135 (1994).

This Court should choose the construction yielding the shorter sentence. *United States v. Bass*, 404 U.S. 336, 348 (1971)(there is "an instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should," quoting H. Friendly, Benchmarks 209 (1967)).

It is wrong to err on the side of imposing the higher sentence especially when those punishments are inconsistent with congressional intent. Mr. Kagan respectfully requests this Court to invoke the Rule of Lenity under these circumstances, to invalidate the guideline enhancement, and remand the matter for resentencing.

Point Five

The evidence was legally insufficient to sustain the mail fraud convictions and the prejudicial spillover from the insufficient charges deprived Mr. Kagan of his due process rights.

There were five mail fraud counts against Mr. Kagan that rested on insufficient circumstantial evidence. No evidence was ever admitted that notices of acceptance, which formed the basis for the charges, were ever mailed. Rather, the Second Circuit merely relied on routine mailing practices for notices unrelated to the five counts to sustain the critical proof on the mailing element and held that there was "ample, sufficient evidence" to support the mail fraud convictions. *See* Appendix C for Summary Opinion. However, *ample and sufficient evidence* does not constitute the proper, proof beyond a reasonable doubt, standard as articulated in *Jackson v. Virginia*, 443 U.S. 307 (1979).

In addition, the Second Circuit completely ignored the prejudicial spillover that resulted from the legally insufficient counts. In this case, the government exploited the insufficient

charges to unfairly link Mr. Kagan to other charges in the indictment (the UFG counts). The government raised the insufficient charges to incite the jury to convict on the other counts in the indictment. This was patently unfair and prejudicial. See, *United States v. Young*, 470 U.S. 1 (1985) (discussing improper invitations to the jury to convict on a basis other than a neutral independent assessment of the record of proof); *Berger v. United States*, 295 U.S. 78 (1935) (discussing prejudice from prosecutor's statements to the jury).

In sum, the five legally insufficient mail fraud counts and the obvious spillover that ensued from those counts grossly prejudiced Mr. Kagan, and as a result his conviction should be overturned.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully Submitted,

GLENN A. GARBER
350 Broadway
Suite 1207
New York, NY 10013
212-965-9370
Attorney of Record for
A. Michael Kagan

DAVID B. KRAUSS
Of Counsel

No. 00-

In The

Supreme Court of the United States

October Term, 2000

A. MICHAEL KAGAN,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

APPENDIX

SW

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UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: March 8, 2000 Decided:) July 18, 2000

Docket Nos. 99-1236, 99-1239, 99-1250, 99-1291

UNITED STATES OF AMERICA,

Appellee,

v.

DONALD FERRARINI, EVERETT J. VIEIRA, A. MICHAEL KAGAN, BRUNO RUMNIGANT, HOWARD MILLER,*

Defendants-Appellants.

Before: CARDAMONE, CALABRESI, and PARKER,
Circuit Judges

Appeal from judgments of conviction for conspiracy to commit insurance fraud and for various other substantive offenses, entered following a jury trial. On appeal,

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* We note that our official caption incorrectly spells defendant Rumignani's name as "Rumnigant" and lists defendant Miller, who is no longer a party to this appeal, as an appellant.

defendants-appellants contend that the district court's denial of one defendant's motion to sever or to adjourn the trial deprived that defendant of his right to testify, that the district court erroneously provided the jury with an instruction on conscious avoidance, when the evidence showed instead actual knowledge, and that the district court erred in concluding that a premium finance company is a "financial institution" within the meaning of U.S.S.G. § 2F1.1(b)(7)(A).

Affirmed

CHRISTOPHER W. CHAN, New York, NY, for *Defendant-Appellant Ferrarini.*

ARTHUR J. VIVIANI, New York, NY (Don D. Buchwald, James M. Keneally, New York, NY, on the brief), for *Defendant-Appellant Vieira.*

NATHAN Z. DERSHOWITZ, New York, NY (Glenn A. Garber, David B. Krauss, Alan M. Dershowitz, New York, NY, on the brief), for *Defendant-Appellant Kagan.*

LARRY H. KRANTZ, New York, NY (Mary Lou Chatterton, New York, NY, on the brief), for *Defendant-Appellant Rumignani.*

WILLIAM F. JOHNSON, Special Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York, Robert S. Khuzami, Robert E. Rice, Assistant United States Attorneys, New York, NY, on the brief), for *Appellee United States of America.*

CALABRESI, *Circuit Judge:*

Defendants Donald Ferrarini, Everett J. Vieira, A. Michael Kagan, and Bruno Rumignani appeal from their judgments of conviction after a jury trial in the United States District Court for the Southern District of New York (Denise Cote, *Judge).* Ferrarini, Vieira, Kagan, and Rumignani were all charged in a 82-count indictment alleging, *inter alia,* conspiracy to commit securities fraud, to make false statements to the Securities and Exchange Commission ("SEC"), to commit mail fraud, and to commit insurance fraud. All four defendants were convicted of conspiracy, in violation of 18 U.S.C. § 371, as well as of various substantive offenses. Thus, defendants Ferrarini and Rumignani were convicted of securities fraud, in violation of 15 U.S.C. § 78ff and 78j(b), of false statements to the SEC, in violation of 18 U.S.C. § 1001, of mail fraud, in violation of 18 U.S.C. § 1341, and of insurance fraud, in violation of 18 U.S.C. § 1033(b)(1);[2] defendant Kagan was convicted of mail fraud, in violation 18 U.S.C. §§ 1341 and 2; and defendant Vieira was

[2] Defendant Rumignani was also convicted of making false statements to the SEC, committing mail fraud, and engaging in insurance fraud, in violation of 18 U.S.C. § 2 (aiding and abetting liability).

convicted of making false statements to the United States Attorney's Office and the FBI, in violation of 18 U.S.C. §§ 1001 and 2.

On appeal, defendants raise numerous challenges to their convictions and sentences, most of which we reject in an unpublished summary order, filed today. Three of their arguments, however, merit greater discussion. We write this opinion to address (1) defendant Kagan's contention that his heart condition precluded him from taking the stand at trial and that the district court's denial of his motion to sever or to adjourn the trial on medical grounds therefore deprived him of his constitutional right to testify, (2) the assertions of defendants Vieira and Kagan that the district court erred in instructing the jury on conscious avoidance, and (3) the arguments of all four defendants that a premium finance company does not fall under the definition of a "financial institution" in the Sentencing Guidelines. We affirm.

I. BACKGROUND

This case revolves around the frauds committed by Underwriters Financial Group ("UFG") from the early 1990s through mid-1995, when UFG filed for bankruptcy.

During this time, Ferrarini was the President and Chief Executive Officer of UFG, as well as shareholder. Rumignani, also a shareholder, was Executive Vice President and Chief Operating Officer. Vieira, who did not own any shares in UFG, was employed as a business analyst for the firm. Kagan had no direct relationship to UFG; he was, however, on the Board of Directors of CPF Premium Financing ("CPF"), one of the companies defrauded by UFG.

Key to this story are also two accomplice witnesses. Mark Bailine was the Vice President of Finance and Administration of UFG who oversaw the accounting department. He was one of the central prosecution witnesses at trial, testifying pursuant to a cooperation agreement. Howard Miller, a Senior Vice President at UFG, oversaw sales and marketing and also testified for the government.[3]

---

[3] Miller was initially charged along with Ferrarini, Vieira, Rumignani, and Kagan, but eventually pleaded guilty, pursuant to a cooperation agreement, to conspiracy, securities fraud, false statements to the SEC, mail fraud, and false statements to the United States Attorney's Office and FBI. He then testified at the trial for the government. He filed a timely notice of appeal, but died shortly thereafter. This court subsequently vacated his conviction and remanded the case to the district court with instructions to dismiss the charges against him.

Around 1970, Ferrarini, Rumignani, Miller, and one Burt Matfus began working together in a privately owned commercial insurance brokerage firm. The firm changed names several times, but finally became UFG in the early 1990s.[4] As an insurance broker, UFG assisted its clients in obtaining insurance, collected from clients the annual insurance premiums that UFG then paid to the insurance carriers, and remitted any refunds or credits from the insurance carriers to the insureds (this could happen, for instance, if the amount of coverage was reduced and, hence, the price of the premium decreased, after it had already been paid). UFG also assisted its clients in obtaining loans from premium finance companies ("premium finance loans"). *See infra* Section I.B.1.

Starting in the mid-1980s, UFG encountered serious financial difficulties. In order to alleviate an expenses-greater-than-income problem, it merged with a publicly traded company to form another public company named Underwriters in the hope that stock offerings by the new company would produce an infusion of capital. Because Underwriters was a public company, it was obliged to file quarterly and annual reports with the SEC. In these reports,

[4] For simplicity, we refer to UFG and its predecessor companies as "UFG."

Underwriters was required to make various financial disclosures including information on the business operations of its wholly owned subsidiary, UFG.

After the merger, UFG continued in the commercial insurance brokerage business. The merger, however, did not have the desired ameliorative financial effects. The company with which UFG joined was saddled with approximately $8 million in prior debt, and this debt was assumed, under the merger agreement, by UFG. Against this backdrop of UFG's less than rosy financial picture, the frauds unfolded.

A. Embezzled Premiums and Credits

The evidence at trial, viewed in the light most favorable to the government, *see United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999), revealed that over the course of eight years, from 1987 to 1995, Ferrarini, Assisted by Rumignani, Matfus, and Bailine, embezzled more than $10 million from UFG's clients and from insurance carriers. As noted above, UFG, as an insurance brokerage firm, stood between its clients, the insureds, and insurance carriers. Accordingly, UFG's clients would forward their premium payments to UFG, which,

after deducting its commission, would, in the ordinary course of events, pay the insurer. Similarly, insurance carriers generally transmitted through UFG any credits owed to the insureds. Rather than forwarding these sums to the insurance carrier or the insured to whom they were owed, however, UFG's accounting department, under Ferrarini's instruction, removed selected premiums and credits from its "accounts payable," issued itself a check in the same amount, and recorded these moneys as income. Ferrarini and Rumignani both signed such checks depositing the embezzled funds in UFG's account.

B. Fraudulent Premium Finance Loans

1. UFG loans from CPF, Imperial, and AI Credit

Commercial insurance premiums are often sizeable, for instance, as much as $1 million, and are due in a lump sum on the effective date of coverage. To aid insureds who lack that kind of capital, organizations called premium finance companies offer loans to insureds, who use the money lent to them to make full payment of the annual premium to the insurance carrier on the due date. These insureds then repay the premium finance company

with an upfront down payment followed by monthly installments, typically over nine months. These loans are called premium finance loans and are at the heart of the frauds in this case.

If an insured defaults on the premium finance loan, the premium finance company has the right to retain the down payment, to cancel the insurance policy being financed, and to obtain from the insurance carrier, which had previously been paid in full for the entire policy year, any unearned premium, i.e., the premium pro rated for the balance of the year. Premium finance loans typically have low interest rates because they are fully secured with collateral (the down payment and the unearned premium).

Premium finance loans can be made in two ways: "care of" or "Direct bill." "Care of" loans are submitted on behalf of the borrower (the insured who seeks to finance an insurance premium) by the insurance broker (e.g., UFG). Once the premium finance loan is approved, the premium finance company sends the loan proceeds, as well as all documentation relating to the loan, such as payment coupons, to the insurance broker, In a "direct bill" loan, the loan proceeds are still sent to the insurance broker, but the loan documentation is sent directly to the borrower.

From mid-1993 to mid-1995, when it filed for bankruptcy, UFG made 37 fraudulent premium finance loan applications, totaling $12 million, to three premium finance companies, Imperial Premium Finance, Inc. ("Imperial"), AI Credit Corporation, and CPF. In order to boost UFG's income, Ferrarini, Rumignani, Vieira, and others at UFG submitted fraudulent "care of" loan applications to these premium finance companies, purportedly on behalf of UFG clients. The clients, however, had in fact already paid their premiums in full and, having done so, did not of course authorize the loans. UFG used the proceeds from these loans to pay UFG's operating expenses, including installment payments on the fraudulent premium finance loans.

Most of the fraudulent loan applications were submitted to CPF. This was because UFG had an insider at CPF, Kagan, who pressured CPF into approving the loans. From August 1994 through November 1994 alone, Ferrarini, Rumiginani, and others at UFG submitted 21 fraudulent "care of" loans, worth $5,946,358, to CPF. Kagan saw to it that the loans were approved by CPF, and in exchange for his services, received $375,000 from UFG. In time, an executive at CPF became suspicious about the high number of "care of" loans from UFG. As a result,

CPF rejected an application for a "care of" loan from UFG, and the co-conspirators applied to CPF for several "direct bill" loans instead.

Subsequently, in February 1995, Ferrarini, Rumignani, Kagan, Vieira, and others held meetings at Vieira's apartment to discuss UFG's financial woes, and especially how the firm would meet its monthly payments on the fraudulent premium finance loans. And in March 1995, Kagan succeeded in pushing through another "care of" loan for over $1 million. (UFG paid him $50,000 in April 1995 for his help.) Finally, in May 1995, UFG was no longer able to pay the monthly installments on its numerous fraudulent premium finance loans, Vieira then admitted the scheme to a CPF officer. Several days later, Matfus committed suicide. In the summer of 1995, UFG filed for bankruptcy. By that time UFG owed CPF approximately $4.9 million in principal and interest and, as a result of UFG's inability to repay this amount, CPF was, in due course, forced to liquidate.

2. KBC loans from CPF

From January 1994 through August 1994, before Kagan began participating in UFG's fraud on CPF, he perpetuated his own fraud on CPF. In addition to serving on the Board of CPF, Kagan also owned his own insurance agence, KBC Systems, Inc. ("KBC"). KBC made five fraudulent applications to CPF for phony premium finance loans, worth $284,349, on a "care of" basis. None of the loans was actually used to finance the insurance premium of t he stated borrowers, as was claimed on the applications. Instead, they were used to pay KBC's operating expenses. KBC eventually repaid these loans in full before CPF learned of the fraud.

C. Securities Fraud and False statements to the SEC

Because Underwriters was a public company, it was required to submit various filings to the SEC. Ferrarini and Rumignani, who were both directors of Underwriters, misrepresented UFG's financial condition (1) by falsely including in these documents, as "income" to UFG, the embezzled premiums and credits as well as the proceeds from the false premium finance loans and (2) by omitting

from the filings UFG's liabilities to repay the embezzled premiums and credits as well as the fraudulent loans. In these ways, Underwriters overstated its income and understated its liabilities by an aggregate amount of more than $11 million.

D. False Statements to the FBI

In October 1995, Special Agent Michael J. Degnan of the FBI and an Assistant United States Attorney interviewed Vieira. In the course of the interview, Vieira falsely stated that "he did not know that the contracts submitted to CPF were for anything other than premium finance loans until late April or early May 1995." Jt. APP. at 1165.

II. DISCUSSION

A. Right to Testify

In July 1998, Kagan Suffered a heart attack. Shortly after, he moved to adjourn or to sever his trial for medical reasons. The district court granted the motion to adjourn and rescheduled the trial from September 1998 to January

1999. Kagan subsequently renewed his motion for a severance or adjournment, again on medical grounds. After holding two hearings and reviewing the medical evidence submitted by Kagan and the government, the district court denied the motion. Relying on the medical evidence in the record and the court's own observations of the defenant, it concluded that a trial would not "produce any threat to [Kagan's] physical health." Kagan App. at 352.

Arguing that the gravity of his heart condition precluded him from taking the stand, Kagan contends that the district court forced him involuntarily to waive his constitutional right to testify when it denied his motion to sever or to adjourn his trial on medical grounds. The district court, he asserts, rejected the motion without specifically considering the effect of his heart condition on his ability to testify at trial and instead considered only his physical capacity to proceed to trial generally.

Normally, we review the decision of the district to grant or to deny a continuation or severance on the basis of a defendant's physical condition for abuse of discretion. *See Bernstein v. Travia,* 495 F.2d 1180, 1182 (2d Cir. 1974); *United States v. Bernstein,* 417 F.2d 641, 643 (2d Cir. 1969); *United States v. Knohl,* 379 F.2d 427, 437 (2d Cir. 1967). But Kagan's argument forces us instead to

determine whether the district court bears an affirmative obligation to examine the impact of a medical condition on the defendant's constitutional right to testify and whether, in this case, Kagan's physical condition forced him involuntarily to waive that right.

There can be no doubt that a criminal defendant has a constitutional right to testify in his own defense. *See Rock v. Arkansas,* 483 U.S. 44, 51 (1987). And this right, the Supreme Court has stated is "[e]ven more fundamental...than the right of self-representation." *Id.* at 52. Accordingly, it is incumbent upon trial courts to prevent an involuntary waiver of the right. *See Ortega v. O'Leary,* 843 F.2d 258, 263 (7th Cir. 1988) ("When waiver of such an important right [as the right to testify] is at issue, a trial court should carefully ascertain through a methodical inquiry whether this right has been voluntarily and intelligent forfeited.")

The case before us, therefore, requires us to consider what steps a district court must take to protect this right when ruling on a motion to sever or to adjourn a trial on medical grounds. We conclude that a trial court does not have an obligation, *in every case* in which a defendant moves for a medical severance or adjournment, to assess the impact of a defendant's medical condition on

her right to testify. *See Brown v. Arguz*, 124 F.3d 73, 79 (2d Cir. 1997) (holding that there is "no general obligation on the trial court to inform a defendant of the right to testify and ascertain whether the defendant wishes to waive that right" and concluding instead that it is trial counsel, and not the trial court, that bears the duty of apprising the defendant about the risks and benefits of testifying). At the same time, in cases in which a trial court has sufficient cause to question a defendant's physical capacity to take the stand or when the defendant has specifically raised the issue of capacity to testify, the district court, in order to insulate this fundamental constitutional right from an involuntary waiver, must determine whether the defendant is in fact physically able to testify. *Cf. United States v. Purnett*, 910 F.2d 51, 56 (2d Cir. 1990) (holding that, "where a trial court has sufficient cause to doubt the competency of a defendant to make a knowing and intelligent waiver of the right to counsel," it must take affirmative measures to ensure that the competency issues are properly resolved in order for any waiver of the right to counsel to be valid, despite the fact that there is no general requirement that a trial court find a defendant competent whenever a defendant has invoked the right to self-representation.).

Moreover, in those cases in which a district court *is* required to make a finding as to the defendant's capacity to testify, it cannot satisfy that obligation simply by stating the generic conclusion that the defendant is physically able to proceed to trial. This is so for two reasons. First, the fact that a defendant has the physical capacity to be present at trial and to assist his defense counsel does not necessarily mean that he is also capable of testifying. And second, the rights to testify, to be present, and to assist in the preparation of one's defense have separate and distinct sources, scopes and purposes. Thus, the right to testify stems from the due process requirement that a criminal defendant be given "an opportunity to be heard in his defense." *Rock*, 483 U.S. at 51 (quoting *In re Oliver*, 333 U.S. 257, 273 (1948) (alteration omitted)). It is also "[l]ogically included" in the right of an accused, under the Sixth Amendment's Compulsory Process Clause, to call favorable witnesses. *Id.* at 52. And it serves as a "necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* The constitutional right to be present at trial, however, is more circumscribed and obtains only "to the extent that a fair and just hearing would be thwarted by [the defendant's] absence." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (quoting *Snyder v.*

Massachusetts, 291 U.S. 97, 108 (1934)) (internal quotation marks omitted). "Although . . . th[e] privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow,'" *id.* (quoting *Snyder*, 291 U.S. at 106-07), there is no similar limitation on the right to testify, that is, a criminal defendant enjoys the constitutional right to testify even when to do so would not be useful.

In this case, Kagan initially put into play the issue of his capacity to testify. At a pre-trial conference on the motion for a medical severance or adjournment, Kanga's trial counsel explicitly expressed his concern that "this is a case where I think it's ... quite likely in the normal course of events Mr. Kagan would testify ... [But][t]here is no way I can envision his being in a position to be able to testify in his own behalf given his current medical condition." Kagan App. At 96. Trial counsel again raised this issue in a written submission. We agree with Kagan therefore that the district court was required to assess his physical ability to be a witness in his own defense. But because Kagan was in fact physically capable of taken the stand at trial, it is clear on the record before us that no involuntary waiver of Kagan's right to testify ultimately occurred.

Before it denied the motion for the medical severance or adjournment, the court below asked Kagan a series of questions to ascertain whether he was mentally competent to be tried. In answer to these, Kagan specifically conceded that he suffered from no mental condition that would interfere with his decision to testify at trial or with his ability actually to testify.[5] Moreover, in a post-trial order denying Kagan's Motion for bail pending appeal, the district court found that "[n]o evidence submitted by Kagan regarding his health undermined the Court's judgment that he was able, if he wished to do so, to testify on his own behalf. Indeed, the Court watched Kagan attentively during the trial and saw no evidence of any health problem that would have raised any issue at to his ability to assist counsel in his defense or to testify." Kagan App. At 426.

The district court's factual finding was amply supported by the evidence in the record, and in particular,

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[5] The court also directed a similar inquiry at Kagan's attorney, who had articulated the concern that Kagan's heart condition had adversely affected his memory. The court asked counsel, "[g]iven the current state of his memory, do you have any concern about his ability to effectively defend himself at trial, including, if he decides to do so, effectively present his case by taken the stand?" Kagan App. At 337. Counsel responded in the negative.

by the district court's analysis of the expert testimony presented in connection with the motion for severance or adjournment. The government's expert, Dr. Weld, had concluded that Kagan had suffered from "a very serious cardiovascular condition" that had since been "successful[ly] treat[ed]" and that "this condition is not a contraindication to participation in trial proceedings." *Id.* at 128. More specifically, Dr. Weld stated that, based on the results of tests administered, "Kagan should not have cardiac symptoms during trial proceedings" because "there is no objective evidence to suggest that his arrhythmia is stress-inducible."[6] *Id.* at 107. Defendant's expert, Dr. Lux, on

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[6] Kagan contends that Dr. Weld's testimony actually supports the position that he was not *physically* capable of testifying because Dr. Weld stated in his report that "[f]rom a subjective standpoint, Mr. Kagan is a highly *emotional* man who (by his own description) perceives interaction with potential antagonists as extremely stressful. . . . .I consider usual courtroom proceedings to be likely to produce an emotional crisis or collapse." Kagan App. At 107-108. The district court rejected this portion of the report as a lay opinion, however, because Dr. Weld's area of expertise was cardiology, not psychiatry. We need not decide whether the district court erred in classifying this testimony as "lay" because Kegan's argument is that he was not physically capable of testifying, not that he was emotionally unequipped to do so. Indeed, it is Kagan's adherence to a rigid distinction between physical and mental health that leads him to dismiss the significance of his own concession, in response to the district court's inquiry, that he was mentally competent to testify.

the other hand, concluded that Kagan "needs to be aggressively treated, preferably in a Heart Failure Center . . . and cannot be exposed to the physical and emotional trauma of trial until he stabilizes." *Id.* at 253. Carefully comparing the two reports, the district court found that both agreed on the basic facts of Kagan's medical condition -- such as his "ejection fraction," an index which is a "critical measure" of congestive heart failure -- but differed only as to their ultimate conclusions. *Id.* at 348.

The court below decided to reject Dr. Lux' conclusion, and articulated several reasons for doing so, including (1) that Dr. Lux acknowledged the absence in Kagan of several symptoms typically indicative of congestive heart failure and (2) that Kagan's own treating physicians -- of which Dr. Lux was not one -- did not recommend the kind of aggressive treatment urged by Dr. Lux. It was well within the court's decision to choose between the competing conclusions of Dr. Lux and Dr. Weld. *Cf. Bernstein v. Travia,* 495 F.2d at 1182 (finding that the district court did not abuse its discretion in declining to hold a hearing on a motion for a medical continuance or severance where there was "no dispute over the basic medical facts; only the conclusion to be drawn therefrom"). Once the district court chose to accept Dr.

Weld's view of Kagan's capacity, the evidentiary basis for its later finding that Kagan was physically able to take the stand was adequately established.

Since the record supports the conclusion that Kagan's heart condition did not prevent him from testifying at trial, the district court's denial of his motion for a medical severance or adjournment did not deprive him of his constitutional right to testify.[7]

B. Conscious Avoidance Instruction

Over the objections of Vieira and Kagan, the district court instructed the members of the jury that, as to the substantive counts of the indictment, they could find a defendant to have known a particular fact if the evidence showed "beyond a reasonable doubt that the defendant . . . was aware that there was a high probability of a fact, but deliberately and consciously avoided confirming this fact."

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[7] Because we find that Kagan's physical condition did not result in an involuntary waiver of his right to testify, we have no occasion to decide whether a deprivation of the right to testify is subject to a harmless error analysis. *Cf. Frey v. Schuetzle*, 151 F.3d 893, 898 n.3 (8th Cir. 1998) (declining to reach question of whether "harmless error analysis applies to the denial of a defendant's right to testify" in a case where the defendant knowingly and voluntarily waived his right to testify).

Jt. App. At 1415-15. The court also instructed the jury, again, over the objections of Vieira and Kagan, that, as to the conspiracy count, it could find a defendant to have known of the unlawful object of the conspiracy -- a requisite finding to sustain a conspiracy conviction if it found the defendant to have "deliberately closed his eyes to what otherwise would have been obvious." Jr. App. at 1416. On Appeal, both Vieira and Kagan contend, for slightly different reasons, that the conscious avoidance instructions were erroneous and therefore warrant reversal. We agree that the district court erred in giving the instructions, but concluded that the errors were harmless.

A conscious avoidance instruction permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact. *See United States v. Adeniji,* 31 F.3d 58, 62 92d Cir. 1994). That is to say, the instruction permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge. But it may only be given if (1) the defendant asserts the lack of some specific aspect of knowledge required for conviction, *see United States v. Civelli,* 883 F.2d 191, 194 (2d Cir. 1989) and (2) the appropriate factual predicate for the charge exists, i.e., "the evidence is

such that a rational juror may reach [the] conclusion beyond a reasonable doubt .... that [the defendant] was aware of a high probability [of the fact in dispute] and consciously avoided confirming that fact," *United States v. Rodriguez,* 983 F.2d 455, 458 (2d Cir. 1993). Unless these two requirements are satisfied, the instruction should not be given. But an erroneously given conscious avoidance instruction constitutes harmless error if the jury was charged on actual knowledge and there was "overwhelming evidence" to support a finding that the defendant instead possessed *actual* knowledge of the fact at issue. *Adeniji,* 31 F.3d at 64.

1. Vieira

Vieira was charged with one count of making false statements, two counts of mail fraud (in connection with a fraudulent loan application to Imperial), and two counts of conspiracy to commit, *inter alia,* mail fraud (in connection with a scheme to obtain fraudulent premium finance loans). The jury ultimately acquitted him of the two substantive mail fraud counts. On appeal, he contends that the conscious avoidance charge was erroneous (1) because it inappropriately allowed the jury, based on mere conscious

avoidance, to infer the requisite intent to participate in the conspiracy and (2) because the necessary factual predicate for the charge did not exist.

a. intent to participate in the conspiracy

There are "two aspects of knowledge involved in a conspiracy: 1) knowing participation or membership in the scheme charged and 2) some knowledge of the unlawful aims and objectives of the scheme." *United State v. Lanza*, 790 F.2d 1015, 1022 (2d Cir. 1986). Conscious avoidance may not be used to support a finding as to the former, i.e., intent to participate in a conspiracy, but it may be used to support a finding with respect to the latter, i.e., knowledge of the conspiracy's unlawful goals. *See United States v. Eltayib*, 88 F.3d 57, 170 (2d Cir. 1996); *United States v. Scotti*, 47 F.3d 1237, 1243 (2d Cir. 1995) ("the reason that we do not permit conscious avoidance instructions on the issue of knowing participation in a conspiracy is that it is logically impossible for a defendant to intend and agree to join a conspiracy if he does not know that it exits."). Vieira maintains that the district court's instructions on conspiracy impermissibly allowed the jury to find that he intended to participate in the

conspiracy based on conscious avoidance.

Reading the charge as a whole – as we must, *see Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) -- we conclude that the jury was properly instructed that conscious avoidance could only be used to infer knowledge of the conspiracy's unlawful objectives, and not of intent to participate in the conspiracy.

The district court first instructed the jury on the substantive crimes charged in the indictment and only later provided instructions on the conspiracy count. In the instructions on the substantive counts, the court gave the jury the following, standard, definition of "knowingly:" "A person acts 'knowingly' if he acts intentionally, voluntarily, and deliberately and not because of a mistake or accident, mere negligence, or other innocent reason." Jt. App. at 1411. After this definition of knowledge, but before the conspiracy instruction, the court instructed the jury on conscious avoidance. The court made clear, however, that the conscious avoidance instruction applied only to the substantive counts. By obvious implication, therefore, the instruction did not apply to the conspiracy charge.

The court went on to tell the jury that in order to

find a defendant guilty of conspiracy, it was required to find (1) an agreement, (2) that the defendant "knowingly, willfully, and unlawfully became a member of the conspiracy;" and (3) "at least on overt act in furtherance of the conspiracy." Jt. App. at 1415. the court stated:

> [¶1] The second element that the Government must prove beyond a reasonable doubt is that the defendant you are considering knowingly, willfully and unlawfully became a member of the conspiracy. *I have already defined the terms "knowingly," "willfully" and lawfully and you must use those definitions here.* Thus, if you find beyond a reasonable doubt that the conspiracy charged in the indictment existed, you must determine whether the defendant you are considering was a member of that conspiracy.
>
> [¶2] In determining whether the defendant you are considering became a member of the conspiracy, you must determine not only whether he participated in it, but whether he did so with knowledge of its unlawful purposes. . . .
>
> [¶3] In determining whether the defendant you are considering joined the conspiracy with knowledge of the [un]lawful objectives you have found that the conspiracy had, you may consider whether that defendant deliberately closed his eyes to what otherwise would have been obvious. The necessary knowledge cannot be established by showing that the defendant your are considering was careless,

> negligent or foolish. However, on may not willfully and intentionally remain ignorant of a fact material and important to his own conduct in order to escape the consequences of the criminal law. If you find beyond a reasonable doubt that the defendant you are considering was aware of a high probability that the object or objects you have already found existed -- for instance, . . . that the premium finance agreements would be submitted to premium finance companies as part of a scheme to defraud those companies . . . -- but deliberately and consciously avoided confirming their existence, than you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge, unless you find that the defendant you are considering actually believed that these objects did no exist.

Jt. App. at 1416-17 (emphasis added).

Vieira contends that the court's incorporation of its prior definition of "knowingly" in the instruction on conspiratorial intent permitted the jury to find that he possessed the requisite intent to participate in the conspiracy through conscious avoidance. But it seems clear that the district court's reference, in what we have numbered ¶ 1 of the conspiracy instruction, to its prior's definition of "knowingly," incorporates only the previously-given standard definition of knowingly and not the previously-given conscious avoidance definition which, by

its own terms, applied only to the substantive counts. And this is made even more clear by the court's explanation in ¶ 3 that, as to knowledge of the *unlawful objectives* of conspiracy, the jury could infer knowledge from conscious avoidance. That is, when it was proper – in the context of the conspiracy charge -- for the jury to infer knowledge based on conscious avoidance, the instructions explicitly so provided. It follows that the charge did not permit the jury to infer knowing participation in the conspiracy based on conscious avoidance.

Moreover, even if the instructions could be construed to permit the jury to find knowing participation in the conspiracy based on conscious avoidance -- which they do not -- the instructions still do not permit the jury to find intent to participate in the conspiracy based on conscious avoidance. This is so because the charge also required the jury, in order to conclude that the defendant possessed the requisite intent, to find that he "willfully" became a member of the conspiracy. And the court explained that "[a] person's conduct is 'willful' if it is knowing *and purposeful* and if a person acts with the general knowledge that his conduct is unlawful *and with the intention* to commit an act which the law forbids." Jt. App. at JA1411 (emphasis added.) Although this definition

of "willful" includes references to knowledge, it also clearly and conjunctively requires a finding of intentional purposefulness. Hence, the conspiracy instruction read as a whole affirmatively required a finding of purposefulness and cannot be taken to permit the jury to infer the necessary intent to join the conspiracy from mere conscious avoidance. *See United States v. Beech-Nut Nut Nutrition Corp.*, 871 F.2d 1181, 1196 (2dCir. 1989) (holding that any error was not reversible where "the charge as a whole properly instructed the jury that conscious avoidance could satisfy only the knowledge element of the offense [i.e., knowledge of the conspiracy's unlawful objectives] or the knowledge component of the intent element" and the instruction required a finding of willful intent to participate in the conspiracy). There is therefore no basis to reverse Viera's conviction for conspiracy.

b. factual predicate for charge

Vieira also contends that the charge was erroneous because the requisite factual predicate for the charge did not exist. Because he challenges only the conscious avoidance instruction on the conspiracy count, the issue before us is whether "the evidence would permit a rational

juror to conclude beyond a reasonable doubt 'that the defendant was aware of a high probability'" of the fact that the premium finance loans were fraudulent, that is, that Viera was aware of at least one of the conspiracy's allegedly unlawful objectives, " and consciously avoided confirming that fact." *United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (*quoting Rodriguez*, 983 F.2d at 458) (internal quotation marks omitted); *see also Lanza*, 790 F.2d at 1022-23 ("While it is not necessary to a conviction for conspiracy for the government to prove that the accused knew all of the unlawful aims and objectives of the scheme charged, the government must demonstrate that the accused had *some* knowledge of its unlawful aims.").

We conclude that the evidence does not establish the requisite factual predicate for the charge. The evidence shows that Vieira actually knew of the frauds; it is not sufficient to permit a finding that he consciously avoided confirming them. The fact that a jury can – on the evidence – find actual knowledge does not mean that it can also find conscious avoidance. If conscious avoidance could be found whenever there was evidence of actual knowledge, a jury could be given a conscious avoidance instruction in a case where there was only equivocal

evidence that the defendant had actual knowledge and where there was no evidence that the defendant deliberately avoided learning the truth. Under those circumstances, a jury might conclude that no actual knowledge existed but might nonetheless convict, if it believed that the defendant had not tried hard enough to learn the truth. Since we have held that conscious avoidance cannot be established when the factual context "*should have apprised* [the defendant] of the unlawful nature of [his] conduct," *Rodriguez,* 983 F.2d at 458 (quoting *United States v. Joyce,* 542 F.2d 158, 161 (2d Cir. 1976) (internal quotation marks omitted)) -- and have instead required that the defendant have been "shown to have *decided* not to learn the key fact," *id.* – such a result might constitute reversible error. *But cf. Adeniji*, 31 F.3d at 63 (suggesting, as an alternate to its harmless error holding, that even though the factual predicate for a conscious avoidance instruction did not exist, where the instruction itself contained no errors, a guilty verdict could be presumed to be on another basis and hence not to be reversible). Because the record does not show that Vieira consciously avoided learning of the fraudulent loans – and the government nowhere asserts that it does -- the charge given was improper. *See Adeniji*, 31 F.3d at 63.

The error in the jury instruction was, however, harmless in the instant case because there was overwhelming evidence that Vieira actually knew of the fraudulent nature of the loans and the jury was properly instructed on actual knowledge. *See id.* (finding that an erroneous conscious avoidance charge constituted harmless error where "there was overwhelming evidence" of defendant's actual knowledge). In 1995, Vieira was present at many meetings at which the co-conspirators gathered to discuss UFG's cash flow shortage and in particular its difficulty in servicing the monthly payments on the fraudulent premium finance loans. Some of these meetings were held in his apartment. At one of these meetings, Kagan described the mechanics of how the group might deceive an inquisitive premium finance company and suggested that he would have one of his employees answer any such call in a manner that would deflect suspicion. The record does show that Vieira was excluded from some of the financial condition meetings because Ferrarini was concerned that he would blow the whistle if he learned just how bad things were. But there is no dispute that Vieira knew of the *existence* of UFG's "black hole,' that is, that he knew that UFG had taken "fraudulent moneys...into income." Jt. App. at 303. Additionally,

Vieira was present when Ferrarini mentioned to the co-conspirators at UFG that they would have to pay Kagan for his assistance in procuring the fraudulent CPF loans. "Accordingly, the evidence of actual knowledge is manifest and, therefore, any error caused by the inclusion of the conscious avoidance instruction was harmless." *Adeniji*, 31 F.3d at 64.

Nor is this conclusion troubled by the fact that the jury acquitted Vieira of the two substantive counts of mail fraud with which he was charged, both of which related to two loans from Imperial in 1993. The evidence of actual knowledge discussed above relates to a later part of the conspiracy and is overwhelming with respect to Vieira's actual knowledge as to the CPF loans in 1995. His acquittal, perhaps for lack of actual knowledge on the 1993 Imperial Loans, therefore does not undermine our conclusion that, two years later, Vieira manifestly had actual knowledge of the fraudulent nature of the CPF loans. Accordingly, we affirm Vieira's conviction on the conspiracy count.

2. Kagan

Kagan also contends that the conscious avoidance

charge constitutes error warranting reversal of his conviction on his substantive mail fraud counts and conspiracy counts.[8] Specifically, he maintains (1) that he never claimed a lack of a specific aspect of knowledge required for conviction and (2) that the factual predicate for the instruction did not exist. We need not reach his first contention because, for the second reason he gives, the charge was indeed erroneous. This is so because the only factual predicate for conscious avoidance to which the government can point is the evidence that Kagan had actual knowledge of the frauds. Once again, the government does not argue, and the evidence does not show, that Kagan deliberately avoided learning the truth. Accordingly, and for the reasons discussed with respect to Vieira, the instruction should not have been given. We conclude, however, that here too the error was harmless because there was evidence beyond peradventure that Kagan, like Vieira, actually knew the loans were fraudulent. He as present at all of the meetings described above at which Vieira was also present, except for the one

[8] The government contends that Kagan's claim, unlike Vieira's, is governed by the plain error standard because Kagan failed to object to the charge at trial. While it is true that Vieira made the oral and written arguments objecting to the charge, Kagan explicitly joined in them. Accordingly, we conclude that he adequately raised to the conscious avoidance issue below.

at which the kickback to Kagan was suggested. Moreover, if Kagan himself proposed the logistics for deceiving a suspicious premium finance company, there can be no doubt on the facts before us that he had actual knowledge of the fraudulent nature of the premium finance loans.[9]

C. Financial Institution

Over the objection of all defendants, the district court found CPF to constitute a "financial institution" within the meaning of the Sentencing Guidelines and therefore enhanced each defendant's sentence by four levels. *See* United States Sentencing Commission, Guidelines Manual ("U.S.S.G."), § 2F1.1(b)(7)(A)(1998) (providing for a four-level increase if the offense of conviction involved fraud or deceit and "substantially jeopardized the safety and soundness of a financial institution")

> Application Note 16 to U.S.S.G. § 2F1.1 defines "financial institution"

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[9] Kagan argues that he had no notice of the conscious avoidance charge and could not therefore structure his defense accordingly. The government, however, had submitted its requested instructions before the trial and had specifically included a proposed conscious avoidance instruction as to the substantive counts. Kagan's contention is therefore frivolous.

> to include . . . any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government.[10]

U.S.S.G. § 2F1.1, comment. (n. 16).

Clearly, premium finance companies are not among the entities expressly enumerated in the Application Note. As a result, all four defendants renew their argument, that a premium finance company is not a "financial institution," and, therefore, that CPF's demise, due to UFG's fraudulent loans, does not justify the sentencing enhancement imposed on them.

In this respect, they first contend that the Sentencing Commission exceeded its statutory mandate

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[10] The application Note also defines "financial institution" to include "any institution described in 18 U.S.C. §§ 20, 656, 657, 1005-1007, and 1014." These statutory provisions primarily reference various types of banks, including, *inter alia*, federal reserve banks, federal lending and credit institutions, credit unions, and agricultural credit associations. None of these code sections lists a premium finance company.

when it declined to limit the definition of "financial institution," in Application Note 16 of U.S.S.G. §2F1.1, to entities that are federally insured. They then assert that even if the Guidelines' broader definition of "financial institution" were permissible, the term still does not encompass a premium finance company such as CPF. Because these arguments raise purely legal questions, we review the district court's ruling *de novo*. *See United States v. Kirvan*, 86 F.3d 309, 311 92d Cir. 1996).

Defendant's first argument has some merit, but not enough to carry the day. In 1989, in the wake of the savings and loans crisis, Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183. *See RTC Commercial Assets Trust 1995-NP3-1 v. Phoenix Bond & Indem. Co.*, 169 F.3d 448, 456 (7th Cir. 1999). In Section 961(m) of FIRREA, Congress instructed the Sentencing Commission, pursuant to its authority under 28 U.S.C. § 994, which empowers the Sentencing Commission to establish appropriate sentencing ranges, to "promulgate guidelines, or amend existing guidelines, to provide for a substantial period of incarceration for a violation of, or a conspiracy to violate [various criminal prohibitions, including the provision criminalizing mail fraud] that

substantially jeopardizes the safety and soundness *of a federally insured financial institution."* § 961(m) of FIRREA, Pub. L. No. 101-73, 103 Stat. At 501 (emphasis added). Thereafter, the Sentencing Commission amended the Guidelines to include a four-level increase for offenses involving fraud or deceit that "substantially jeopardized the safety and soundness of a financial institution." *See* U.S.S.G. § 2F1.1(b)(7)(A)(1998).

In so doing, the Commission made explicit that the affected financial institution need not be federally insured for the enhancement to apply. *See id.*, comment. (n. 16). Clearly, then, the Guidelines definition of "financial institution," which includes non-federally insured entities, is broader that that contemplated by Congress when it enacted FIRREA. Indeed, the Sentencing Commission flagged the fact that it was "implement[ing], *in a broader form*, the instruction to the Commission in section 961(m) of [FIRREA]." U.S.S.G. § 2F1.1 Background (1998) (emphasis added). The question presented, therefore, is whether the Sentencing Commission had the legal authority to adopt this broader definition. We conclude that it did.

Through the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2017-26 (codified at 28 U.S.C. §§ 991-98), "Congress . . . delegated to the

[Sentencing] Commission 'significant discretion in formulating guidelines' for sentencing convicted federal offenders." *United States v. LaBonte*, 520 U.S.751, 757(1997) (quoting *Mistretta v. United States*, 488 U.S. 361, 377 (1989)); see also 28 U.S.C. § 994(a); *Kirvan*, 86 F.3d at 311 (recognizing that Congress expressly delegated rulemaking authority to the Commission). The Commission has broad authority, and is in fact required, under the Act to promulgate guidelines for the determination of sentences and "general policy statements regarding application of the [G]uidelines," in a manner that, *inter alia*, "reflect[s] the seriousness of the offence, ... promote[s] respect for the law, and ... provide[s] just punishment for the offense." 28 U.S.C. § 994(a)(2); 18 U.S.C. § 3553(a)(2)(A).

As a result, FIRREA, is not the sole source of the Commission's authority to define a "financial institution." The broad definition found in § 2F1.1(b)(7) and in the Application Note was, we conclude, promulgated not so much pursuant to FIRREA, but in the exercise of the Commission's general statutory powers under § 994(a) of the Sentencing Reform Act. *See* U.S.S.G. ch. 1, pt. A., intro. comment 1. Under that section, the Commission was authorized to develop guidelines -- like the one at issue

here -- that reflect the seriousness of the offense at issue, to promote respect for the law criminalizing that offense, and to provide just punishment for it. *See* 28 U.S.C. § 994(a). We therefore hold that the Commission was fully empowered, under the Sentencing Reform Act, to adopt the definition of "financial institution" currently contained in the Guidelines, even thought the definition is broader than that suggested in FIRREA.[11] *See United States v. Lauer*, 148 F.3d 766, 769 (7th Cir. 1998) (Posner, *Chief Judge*) (finding that the Guidelines' definition of "financial institution" was broader than that suggested in FIRREA, but that the Sentencing Commission appropriately acted in its delegated capacity in defining "financial institution" to include entities that are not federally insured).[12]

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[11] We need not reach the questions of whether, and, if so, under what circumstances, the Commission can abuse its statutory discretion under the Sentencing Reform Act. In this case, defendants assert only that the Commission exceeded its authority under FIRREA.

[12] Defendants' appeal to the Supreme Court's decision in *LaBonte* is unavailing. In that case, the Supreme Court held that language in the Commentary to the Guidelines that was *inconsistent* with a federal statute could not stand. *LaBonte*, 520 U.S. at 753. Thus, *LaBonte* stands for the incontrovertible proposition that "[i]f the Commission's revised commentary is at odds with [a statute's] plain language, it must give way." *Id.* at 757. In this case, however, the Application Note's definition of "financial institution" is not "at odds' with FIRREA; it goes

Because the Sentencing Commission was authorized to adopt the existing definition of "financial institution" in Application Note 16, we must next determine whether a premium finance company falls within that definition. Since a premium finance company is not among the entities explicitly listed in the Application Note, the question before us is whether such a company qualifies as "any similar entity, whether or not insured by the federal government," for these are also covered by the guideline. *See* U.S.S.G. § 2F1.1, comment. (n. 16)

Defendants maintain that, in light of FIRREA and the other types of institutions listed in the application Note, the enhancement is intended to apply only when the demise of the institution at issue causes a financial loss to the public. And, according to defendants, due to the unique structure of premium financing, CPF's liquidation caused no harm to the public.

Surprisingly, no circuit court has yet ruled on what the Sentencing Commission meant when it defined a

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further than FIRREA, and this, the Commission was fully authorized to do. *See United States v. Jackson*, 60 F.3d 128, 133 (2d Cir. 1995) (holding that § 994(a) of the Sentencing Reform Act "vested the Commission with authority to expand the [statutory] definition of 'controlled substance offense' to include aiding and abetting, conspiring, and attempting to commit such offenses").

"financial institution." *Cf. United States v. Schinnell,* 80 F.3d 1064, 1070 5th Cir. 1996) (Unfortunately, there is scant authority among the courts of appeal construing" a related provision under the Guidelines, enhancing by four levels for an offense involving fraud or deceit that "'affect[s] a financial institution and [from which] the defendant derived more that $1,000,000 in gross receipts'") (quoting U.S.S.G. § 2F.1(b)(7)(B)). And the only decision, to our knowledge, dealing directly with premium finance companies, is an unpublished one by the Western District of Missouri in which the court equivocally and, with little analysis, found such a company not to constitute a "financial institution" within the Guidelines, see *United States v. Uffman*, No. 94-00139-01CR-W-6, 1994 WL 504601 (W.D. Mo. Sept. 9, 1994) -- a conclusion we reject.

We note, first, in passing, that defendants' effort to limit "financial institutions" to those entities whose collapse would injure the public stems from reading the Application Note in conjunction with FIRREA. But, as discussed above, the Application Note was promulgated pursuant to the commission's authority under the Sentencing Reform Act and explicitly adopts a definition that is broader than that contemplated in FIRREA. FIRREA, therefore, and its

concern with the insolvency of federally insured financial institutions do not provide a limiting principle on the Guidelines' definition of "financial institution."

But even assuming, *arguendo,* that the Application Note's definition of financial institutions is limited to those entities whose peril would in turn "create monetary losses to the public," Brief for Kagan at 38, the record does not support defendants' contention that CPF does not qualify. It is simply not the case that "the *only* entity adversely affected by CPF's insolvency was CPF." Brief for Rumignani at 33. It is true, as defendants point out, that CPF's loans were, in general, fully secured by the down payment made by the insured and CPF's right to any unearned premium. And defendants are correct to state that neither the insureds who borrowed from CPF, nor the insurance companies which had already been fully paid at the start of the policy year were directly harmed by CPF's collapse. But CPF itself was a borrower and its lenders were, in turn, banks, such as the Bank of Montreal, Cigna Bank, and the National bank of Georgia. As a premium finance company, CPF was, in fact, precisely in the business of borrowing money from parties, whom it was obligated to repay, and of lending out that borrowed

money at a higher interest rate.[13] It was, in that respect, very like a bank. *See* Webster's Third New International Dictionary, Unabridged 172 (1993) (defining "bank" as "an establishment for the custody, loan, exchange, or issue of money, for the extension of credit, and for facilitating the transmission of funds by drafts or bills of exchange; ...an institution incorporated for performing one or more of such functions").

When defendants' company, UFG, was no longer able to pay its debts, it owed CPF some $4.9 million in principal and interest. Under the terms of CPF's agreements with its own lenders, CPF was then required to repurchase the bad loans it had made. Unable to do so, CPF eventually liquidated its assets. And while CPF "tried" in the process "to maximize the return for the sake of our lenders," those lenders "were obviously out some money." Jt. App. at 613. The record, therefore, plainly belies defendants' contention that no one, save CPF, was affected by CPF's insolvency.

We conclude that premium finance companies, including CPF, are entities whose financial peril endangers

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[13] It was, in this respect, very different from, say, a department store that, in order to sell goods, gives its customers a line of credit, even if the moneys for that line of credit are themselves provided to the store by a bank.

the general public and whose functions are sufficiently bank-like to constitute financial institutions within the meaning of Application Not 16, which on its face includes varied and sundry forms of banks and "any similar entity, whether or not insured by the federal government." U.S.S.G. § 2F1.1, comment. (n. 16). For, as the Seventh Circuit put it, "when it walks and talks like a financial institution, . . .it is, in our view, covered by [§2F1.1(b)(7)]." *United States v. Randy*, 81 F.3d 65, 69 97th Cir. 1996) (finding that a "phony" bank that was nevertheless "licensed as a bank by Montserrat and licensed by Grenada as a company with broad banking powers" was a "financial institution" within the meaning of § 2F1.1).

III. CONCLUSION

Because the record supports the conclusion that Kagan's medical condition did not preclude him from testifying, we reject the argument that his constitutional right to testify was violated by the district court's denial of his motion for a medical adjournment or severance. And although we agree with both Vieira and Kagan that the district court erred in instructing the jury on conscious avoidance, we conclude that these errors were harmless. Finally, we find that the Sentencing Commission was statutorily authorized,

pursuant the Sentencing Reform Act, to promulgate a Guidelines definition of "financial Institution" broader than that found in FIRREA and that a premium finance company is a "financial institution" within the meaning of that Guidelines definition.

For the foregoing reasons, and for those articulated in the accompanying summary order, we AFFIRM the convictions and sentences of all four defendants.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of July two thousand.

PRESENT:

HON. RICHARD J. CARDAMONE,
HON. GUIDO CALABRESI,
HON. FRED I. PARKER,

UNITED STATES OF AMERICA
Appellee,

v.

SUMMARY ORDER
98-1236, 99-1239
99-1250, 99-1291

DONALD FERARINI, EVERETT T J. VIERA, A. MICHAEL KAGAN, BRUNO RUMNIGANT, HOWARD MILLER, *

Defendants-Appellants.

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* We note that our official caption incorrectly spells defendant Rumignani's name as "Rumnigant" and lists defendant Miller, who is no longer a party to this appeal, as an appellant.

Appearing for Appellants: CHRISTOPHER W. CHAN, New York, NY, for *Defendant-Appellant* Ferrarini; ARTHUR J. VIVIANI, New York, NY, for *Defendant-Appellant Vieira;* NATHAN Z. DERSHOWITZ, New York, NY, for *Defendant-Appellant Kagan;* LARRY H. KRANTZ, New York, NY, for *Defendant-Appellant Rumignani.*

Appearing for Appellee: WILLIAM F. JOHNSON, Special Assistant United Stated Attorney, New York, NY.

Appeal from the United States District Court for the Southern District of New York (Denise Cote, *Judge).*

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

Defendants Donald Ferrarini, Everett J. Vieira, A. Michael Kagan, and Bruno Rumignami appeal from their judgments of conviction after a jury trial in the United States District Court for the Southern District of New York (Denise Cote, *Judge).* In an opinion filed concurrently with this summary order, we address three of defendants' claims on appeal. We address their remaining contentions in this summary order. The facts relevant to this case are set forth in the accompanying opinion.

DISCUSSION

A. Sufficiency of the Evidence Claims

1. Rumignani

In the court below, Defendant Rumignani brought a Rule 29 motion, challenging the sufficiency of the evidence in support of his conviction for insurance fraud. In a well-reasoned opinion and order, the district court denied the motion. For substantially the reasons articulated by that court, we affirm Rumignani's conviction.

2. Kagan

Defendant Kagan challenges the sufficiency of the evidence in support of his mail fraud conviction with respect to the fraudulent loan applications made by Kagan's insurance agency, KBC Systems, Inc. ("KBC") to CPF Premium Financing ("CPF"). The evidence at trial showed that all of the premium loan applications bore Kagan's signature as "Broker," thereby tying him directly to frauds concededly committed by the company he owned. Moreover, there was ample evidence showing routine use of the mails by CPF in defivering "Notices of Acceptance" for the fraudulent loans that had been approved. *See United States v. LaBarbara,* 129 F.3d 81, 85 (2d Cir. 1997) (customary business practice can establish proof of mailing to support conviction for mail fraud). Accordingly, there was sufficient evidence to support the mail fraud conviction.[1]

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[1] We therefore need not reach Kagan's argument that his remaining convictions should be reversed because the erroneous conviction for mail fraud resulted in "prejudicial spillover."

3. Vieira

Vieira was convicted of falsely stating to the federal Bureau of Investigation and the United States Attorney's Office that "he was unaware until late April or early May 1995 that [p]remium finance loans obtained by UFG from CPF were not used to pay customer insurance premiums."Jt. App. at 71. On appeal, he contends that there was insufficient evidence to show that this statement was false. But the evidence at trial showed, and Vieira himself adknowkedges in his brief, (1) that the proceed from the fraudulent premium finance loans were used to make payments on prior fraudulent loans and not to pay customer insurance premiums and (2) that Vieira was aware of this fact before April 1995. Accordingly, there was sufficient evidence to support the conviction.

B. Cross-Examination of Bailine by Rumignani

The district court made a pre-trial ruling that prohibited repetitive cross-examination by different defendants. Consistent with this ruling, the district court cut off Rumignani's cross-examination of prosecution witness Bailine, with respect to Bailine's cooperation agreement. It did this in light of the fact that Ferrarini's counsef had previously cross-examined Bailine on the same points. Rumignani argues on appeal tht the district court's ruling violated his rights under the Confrontation Clause because (1) it effectively bound him to the cross-examination of an attorney for a co-defendant and (2) it was an impermissible "blanket prohibition" on an entire topic central to the issue of witness credibility, *see United States v. Maldonado-Rivera*, 922F.2d 934, 955 (2d Cir. 1990).

Trial judges have "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits

on...cross-examination based on concerns about...interrogation that is repetitive." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). We review the decision of a district court to restrict cross-examination for an abuse of discretion. See *United States v. Rosa*, 11F.3d 315, 335 (2d Cir. 1993). A limitation on cross-examination is proper, so long as "the jury is in possession of facts sufficient to make a discriminating appraisal of the particular witness's credibility." *Id.* at 336 (internal quotation marks omitted).

Because Bailine was a key prosecution witness, his credibility was a central issue at trial. But it is clear from the record that the specific questions that Rumignani sought to pursue with Bailine, and that the district court precluded, had already been asked by Ferrarini. Rumignani's counsel made no offer of proof as to the revelance of his intended questions, nor did he outline for the court questions that he would like to ask regarding the cooperation agreement that had not previously been asked. Since Ferrarini had already elicited the specific facts bearing on Bailine's credibility that Rubignani sought to draw out, "the jury [was] in possession of facts sufficient to make a discrimination appraisal" of Bailine's credibility. *Id.* It was therefore well within the discretion of the district court to preclude the repetitive questioning. *See id.* Because the district court's specific decision to limity the cross-examination was proper, we need not address the larger questions Rumignani raises with respect to the court's pre-trial ruling.

C. Sentencing Challenges

1. Vieira

Vieira contends that the district court clearly erred in sentencing him based on the loss attributable to the fraudulent

loans from Imperial to UFG because, according to Vieira, the district court made no findings that these loans were within the scope of the conspiracy which Vieira had joined. This argument is meritless. The district court explicitly found that the evidence at trial established by a preponderance of evidence (1) that Vieira was fully involved as a knowing participant in the premium finance loan scheme during the period when the fraudulent loans from Imperial were made and (2) that Vieira served as UFG's prime go-between with Imperial on the subject of the loans at issue. On this record, we cannot say that the district court clearly erred in finding that the fraud loss, on whose basis Vieira was to be sentenced, included the fraudulent Imperial loans.[2]

2. Ferrarini

Ferrarini raises several challenges to his sentence. We find all of them to be without merit.

a. Motion to Adjourn Sentencing

He first contends that the district court abused its discretion in denying his requests to adjourn sentencing. We review the decision of a district court "respecting the scheduling of sentencing proceedings" for an abuse of discretion. *United States v. Prescott*, 920 F.2d 139, 146-47 (2d Cir. 1990).

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[2] The fact that Vieira was acquitted by the jury of the substantive mail fraud count involving Imperial does not, of course, trouble this conclusion. A conviction must be supported by proof beyond a reasonable doubt, see *Jones v. United States*, 526, U.S. 227, 232 (1999), while a sentencing finding generally needs only to be supported by a preponderance of evidence, *see McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

After trial but before sentencing, Ferrarini obtained new counsel. The district court granted this counsel an extension of time within which to file objections to the presentence report, but denied a subsequent motion to adjourn the sentencing hearing. The district court based its denial on the grounds that (1) there was no showing that an extension of time would serve any purpose, (2) new counsel had already "been given more than ample time to submit... materials," Jt. App. at 1480, and (3) many of the calculations affected more than one defendant and the court wanted to ensure that "everyone had a right to be heard with respect to some of these fundamental issues that run throughout this series of sentences," Jt. App. at 1473. In the light of these three reasons for the denial of the continuance, we find that the district court did not abuse its discretion. *See Prescott*, 920 F.2d at 147 (nine days was "sufficient time" for a defendants' "new attorneys...to review the government's sentencing memorandum").[3]

B. Loss Calculation

Ferrarini presents several objections to the district court's calculation of the amount of loss for which he was held accountable.

Arguing that CPF did not actually suffer a loss, he cites facts "upon information and belief in his appellate brief to show that CPF may be able to recover moneys that are in an escrow

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[3] Ferrarini also asserts that the district court's denial of the continuance violated his right to due process. This argument was raised for the first time in appellant's reply brief and accordingly, is waived. See *United States v. Gabriel*, 125 F.3d 89, 100 n. 6 (2d Cir.1997).

account or from an insurance policy. We need not address this argument because it is based on facts that were not raised below and hence are not contained in the record on appeal.

Ferrarini also contends that the district court erred in sentencing him based on the loss to two insurance companies from which UFG embezzled premiums because there was a factual dispute over whether these companies had been repaid. The district court, however, found that the companies had not, in fact, deen repaid. And repayment, in any event, would not reduce the applicable loss calculation for a conviction of embezzlement. *See* U.S.S.G § 2B1.1, comment. (n.2); *United States v. Arjoon,* 964F.2d 167, 172 (2d Cir. 1992).

Additionally, Ferrarini asserts that the district court clearly erred in valuing the loss created by the securities fraud at $11,416,832. In order to assess the loss, the district court multiplied "the total number of outstanding [UFG] shares held by the public... by the difference between the price of the shares on April 12, 1995, the date on which the AMEX froze trading in the State of New York, and before the true financial status of UFG was publicly disclosed, and the share price on August 29, 1995, after AMEX had frozen the stock." Jt.App. at 1507. We have approved of this method for calculating a fraud loss. *See United States v. Stanley*, 54 F.3d 103, 105-107 (2d Cir. 1995).

C. Extent of Downward Departure

Ferrarini moved below for a downward departure based on age. And the district court in fact granted a one-level departure. On appeal, Ferrarini contends that the district court should have departed further. It is well-established, however,

that we may not review the extent of any departure. *See United States v. Moe*, 65 F.3d 245, 251 (2d Cir. 1995).

III. CONCLUSION

Having reviewed all of defendants' arguments and finding them to be without merit, we AFFIRM the judgment of the court below.

For the Court,

ROSEANN B. MacKECHNIE
Clerk of Court

by:_____

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of September two thousand.

USA,

Appellee

Dkt No: 99-1236 (L)
re: 99-1291 con

v.

Ferrarini (A. Michael Kagan),

Defendant-Appellant

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant A. Michael Kagan.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:_____
Beth J. Meador,
Administrative Attorney

18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, ot to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both: If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

U.S.S.G. § 2F1.1 (b) (7) (A)

Application Note 16

"Financial institution," as used in this guideline, is defined to include any institution described in 18 U.S.C. 20, 656, 657, 1005-1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. "Union or employee pension fund" and "any health, medical, or hospital insurance association," as used above, primarily include large pension funds that serve many individuals (e.g., pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (e.g., medical or hospitalization insurance) to large numbers of persons.

THE COURT: Good. Let me deliver my opinion with respect to the other branch of the medical issues, and that is Mr. Kagan's physical situation.

By letters dated July 30, 1998, and August 10, 1998, Mr. Kagan moved to adjourn or sever his trial for medical reasons. On August 19, 1998, for this reason and because of counsels' additional scheduling conflicts, I adjourned the trial without objection, a trial that was originally scheduled for September and is now scheduled for January 4. Now before this Court is Mr. Kagan's renewed application for a severance or adjournment of his trial for medical reasons. The Court held a hearing on the application on December 8, 1998, at which time I heard the testimony from Dr. Francis Weld, the cardiologist retained by the government to examine Mr. Kagan. At the conclusion of that hearing, I offered the defendant an opportunity to present additional evidence. He has submitted the report of Dr. Michael Lux on the defendant's condition, and I heard the testimony of Dr. Weld at a second hearing on this motion today. The defendant failed to produce Dr. Lux for the second hearing at the time set by the Court and after he represented that Dr. Lux's testimony would not extend substantially beyond his written report already in evidence, I closed the hearing after Dr. Weld completed his testimony. For reasons I will discuss now, I find that Mr. Kagan's motion for

medical severance or adjournment must be denied.

A decision concerning the medical severance is committed to the sound discretion of the trial court. *United States v. Gambio,* 809 F. Supp. 1061, 1077 (S.D.N.Y. 1992). In *United States v. Doran,* 328 F. Supp. 1261, 1263 (S.D.N.Y. 1971), this Court suggested five factors to be considered when determining whether severance is appropriate: (1) the medical evidence; (2) the defendant's activities "outside the courthouse;" (3) the availability of measures "to minimize the risks to defendant's health in subjecting him to trial;" (4) "the temporary or permanent character of the physical problem, since this postponement is a relatively easily, bearable and obvious measure for the case of curable impairments; and "(5) the "magnitude and seriousness of the case – that is, the degree of loss to the public interest deemed to result form delay or total preclusion of a trial." I have reviewed the evidence presented with these factors in mind.

Turning now to the medical evidence. The evidence presented by Kagan is as follows: He presented no witnesses at either of the Court's hearings but instead relied on his own counsel's questioning of Dr. Weld and materials presented in connection with these hearings. Since august of this year, Mr. Kagan has presented four letters to the Court from physicians in support of his application, and offered these again as evidence

at the Court's first hearing. These letters include three letters from Dr. Mark Warshofsky, Kagan's treating physician, dated August 4, September 18, and November 19, 1998, and one letter from Dr. Mehmet Oz, Kagan's cardiac surgeon, dated November 20. The Court has considered these letters, as well as Dr. Weld's testimony. In addition, Kagan has offered, and I have considered the report and cover letter of Dr. Michael Lux, a cardiologist and expert in this case.

There is no dispute that Mr. Kagan suffered a heart attack in July of 1998 precipitated by or conjoined with severe ventricular arrhythmias, coronary artery disease and congestive heart failure. Mr. Kagan's condition with respect to the arrhythmia prior to this surgeries in August was called, by both Drs. Weld and Warshofky, ventricular tachycardia. According to Dr. Oz, "Mr. Kagan had severe ventricular arrythmias requiring replacement of and automatic internal cardiac defibrillator" inside his chest. Dr. Weld explained that this device, also known as an AICD, provides an electrical currant to the heart when it detects abnormal heart rhythms to correct such abnormal functioning and thus prevent more severe consequences to the patient. Mr. Kagan underwent surgery on August 3 to "re-vascularize" through coronary bypass operation, and then underwent a second operation on August 7 to implant the AICD. His medical condition prior to and during this period

was indisputably severe. The Court finds, however, that the remarkable success of those surgeries fortunately has rendered the risk of serious physical effects from proceeding to trial as scheduled extremely low.

Dr. Weld based his written report and oral testimony on his review of, among other items, the defendant's discharge summary dictated by Dr. Warshofsky on August 10; his chest x-ray report dated November 19; his echocardiogram dated November 20; his ventilation profusion lung scan dated November 19; and his Doppler lower extremity scan dated October 14. The latter two tests were done to find any evidence of blood clots. None were found. In addition, Dr. Weld interviewed the defendant for approximately on hour and 20 minutes. Finally, Dr. Weld spoke briefly with Dr. Warshofsky on two occasions and with Dr. Oz on one.

Dr. Weld stated in his report, and confirmed in his testimony, that the x-rays and echocardiogram indicate only "mind abnormalities of heart function." Weld testified that he sees no sign of congestive heart failure form which Mr. Kagan suffered before his surgery and treatment this summer. And, in addition, he found only mild thickening of the relevant heart muscle, and stated that Mr. Kagan's heart pumping function was only mildly to moderately reduced. Finally, Weld found "there is no objective evidence to suggest that his arrhythmia is stress

inducible. "As to Kagan's intermittent shortness of breath exhibited during his interview with Dr. Weld, Dr. Weld opined that this behavior resulted from an emotional condition and not form any cardiac condition. Furthermore, under questioning, Dr. Weld indicated that none of the medications which Mr. Kagan is now taking is likely to impair his ability to prepare for and attend the trial proceedings. In sum, therefore; Dr. Weld opined that Mr. Kagan's surgeries and subsequent treatment have successfully restored Mr. Kagan's heart function and health and , indeed, have ensured through the AICD that Mr. Kagan will be essentially protected form further arrhythmias. The Court noted as well that Kagan has not suffered any arrhythmias since the AICD was inserted into his chest, as indicated by the historical record kept by the AICD itself and checked by his doctors. Indeed, in a stress test administrated by Kagan's physicians after his surgery, they were unable to induce any arrhythmia.

Neither Dr. Lux's repot nor the defendant's other evidence undermines these findings. To be sure, Dr. Lux opines that "it would be dangerous, and potentially life threatening to subject this patient to trial at this point." The specific findings upon which this conclusion is based, however, do not withstand scrutiny. Those findings fall, in relevant parts, into the following categories: (1) Mr. Kagan's congestive heart failure; (2) his

depression; and (3) his shortness of breath and his obstructive pulmonary disease and other lung ailments. I will address each in turn.

As to his congestive heart failure, it is undisputed that that patient has an ejection fraction of his left ventricle of 30 to 35 percent, a critical measure of this condition. While Dr. Lux appears to conclude that this demonstrates severe heart failure, Dr. Weld explained that this level is generally considered only mild compromise of pumping capacity. A 40 percent fraction is normal; a 20 percent or lower fraction is customarily deemed "severe." Weld also indicated that he would not send a patient with this level of heart failure to the Heart Failure Treatment Center at Colombia Presbyterian. He indicated that he typically sends patients with levels of only 10 percent or lower ejection fraction to that center for treatment. Indeed, Weld does not place any exercise restrictions on patients with test results like Kagan's. Moreover, Dr. Lux himself reports that "there was no evidence of pleural effusion or pulmonary vascular congestion," both indicators, according to Weld, that would be present if Kagan suffered serious congestive heart failure. Similarly, Lux found "no palpable organomegaly" or enlargement of the liver or spleen. According to Weld, such enlargement would, if present, indicate congestive heart failure. Finally, Lux found no edema or swelling in the extremities, a symptom that would, if

present, point to congestive heart failure. Further, Kagan's blood pressure fo 140 over 90 is only slightly above normal, and in fact, was considered normal by Dr. Weld in a stressful examination setting. In sum, the best tests for presence of congestive heart failure, the echocardiogram and chest x-ray, indicate that Kagan does not have a serious heart problem that poses any risk to his health from attending trial.

The Court finds that the evidence indicates that Kagan's heart function is only mildly impaired at present and that this impairment is not a basis for a medical severance. It is notable in this regard that Kagan's own treating physicians have not determined that their patient requires the kind of immediate, aggressive treatments envisioned by Dr. Lux. Kagan has not suggested, and there is no evidence to suggest, that his treating physicians, both of whom are on the staff at Columbia Presbyterian, are incompetent or uninformed as to his condition. The Court thus finds that Dr. Lux's conclusion on this point is insufficient to outweigh the testimony of Dr. Weld and the silence of Kagan's own physicians as to treatments that Kagan is not now already receiving.

As to Kagan's shortness of breath – the most prominent symptom of his present health complaints –there is no medical justification for severing him from trial due to this condition. His shortness of breath is not due to his heart condition and is

not even explained by the condition of his lungs. It appears that it remains largely an emotional reaction to his physical and /or legal predicament.

As to Kagan's depression and anxiety, it is undisputed that Kagan is anxious and depressed. Dr. Weld agreed that Kagan is upset, and testified to the risk of an "emotional crises or collapse" at trial. As Dr. Weld himself acknowledged, his opinion as to Kagan's emotional state was based entirely on Mr. Kagan's self-assessment and comments of his wife to Dr. Weld. In addition, Dr. Weld further acknowledged that his expertise is in internal medicine and cardiology; it is not in any area of mental health. The Court recognizes that Mr. Kagan's position as a defendant in this case, like that of any defendant in a criminal trial, regardless of his physical condition, inevitably produces serious emotional discomfort and emotional pain. Such feelings standing alone, however, cannot support a motion to sever or adjourn a trial on medical grounds.

As to Kagan's obstructive pulmonary disease, it is undisputed that he suffers form this disease. As Dr. Weld testified, however, this is derived from his decades of smoking and not from any volatile heart condition. It will not change. It did not prevent him from engaging in physical activity before his heart attack, and there is no evidence that it prevents him form attending trial and aiding in the preparation of his defense.

Similarly, according to Weld, the "crackles" in his lungs results form his history of smoking and not from his cardiac condition. In short, there is no evidence that Kagan's lung problems are any different than they have been for years or that they will improve any time soon. Neither Dr. Lux nor any other physician form whom the Court has heard even suggests that these problems would render it difficult to attend trial and aid in preparing his defense. Dr. Lux's observations and conclusions do not, therefore, support Kagan's need for a severance.

As to Kagan's treating physicians, Dr. Oz has stated recently that Kagan's "poor physical, condition will probably preclude him from further significant physical activities" and has "advised him to avoid all stress since his dismay proved detrimental to his condition". In September, Dr. Warshofsky similarly "recommend[ed]" that he "(as much as possible) avoid both physical and mental stress." Neither of these physicians has spoken specifically to the impact of trial proceedings, however, and neither has indicated that a significant threat to Mr. Kagan's physical health would be imposed by such proceedings.

In sum, the Court finds that the defendant has failed to demonstrate that proceeding to trail in January without a severance would produce any threat to his physical health.

By Hand
Honorable Denies L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Rm. 1040
New York, New York 10007

Dear Judge Cote:

I am representing a Michael Kagan on his appeal before the Court of Appeals. I am writing for two reasons.

First, I was informed by chambers that you did not receive our motion for bail pending appeal which was filed with the Clerk of the Court on Friday, June 25, 1999. As such, I am enclosing a courtesy copy for your review. An issue may exist in regard to whether an application for such relief was requested and whether a denial was rendered at the sentencing proceeding. We have taken the position that a formal application and ruling was not made. Attached is a copy of the relevant portion of the sentencing proceeding for your review. If you find that an application was made and denied, it is requested that an order issue as soon as practicable to that effect. I have discussed this matter with AUSA William Johnson, and he is awaiting communication from the Court regarding how to proceed on the motion.

Second, Mr. Kagan is requesting an extension of his surrender date. Your honor invited an application for an extension of surrender if there was an unusual delay in

designation. Attached is a copy of the relevant portion of the sentencing proceeding for your review. As of this date, Mr. Kagan has not been notified of his designation, and we would like the opportunity to communicate with the physicians at his designated facility to verify that they are capable of providing the necessary medical care and that they have the specific medications that are required for his survival. It should be noted that since his sentencing date, Mr. Kagan's medical condition has deteriorated. He is also requesting a surrender to his permanent facility, and not to the MCC, because of his serious medical conditions.

In light of the fact that his surrender date is July 9, 1999 we would appreciate your prompt consideration of these matters.

Very truly yours,

Glenn A. Garber

cc: William Johnson
Assistant U.S. Attorney (by Facsimile)